

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

OR

74-1157

To be argued by
STUART D. WECHSLER

In The

United States Court of Appeals

For The Second Circuit

WILLIAM R. VAN GEMERE, ALBERT A. HENNING,
EDWARD E. HOUCHINS, NATHAN PEARLMAN, ELIAS
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ALBERS, ABRAHAM STERN, EDWARD KEMPLER,
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VINCENTE J. BONNARD, HAROLD M. WHITE and
MARGARET C. WHITE, MORRIS BERNSTEIN, WALTER

(Continued)

*On Appeal from Judgment of the United States District Court
for the Southern District of New York.*

BRIEF FOR PLAINTIFFS-APPELLANTS



L. EATON, ERNEST G. ANGEVINE, ABRAHAM PERCHICK, COMMITTEE FOR THE ESTATE OF MAX SCHNEIDER, an incompetent, FRANCIS H. SHOOBE, and ALBERT A. ARDITTI, GERTRUDE McNAUGHT, MRS. J. H. STEIN, JOAN S. BERMAN, J. DAVID STEIN, SARAH E. MORITZ, VIRGINIA W. STAUB, LOUIS BERGLAS, DR. JACK DIENER, DENNIS J. FINN, BERTHA J. WINER, JOANNE W. FINN and S. EDWARD MITTLER, for and in behalf of themselves and for all other holders of the BOEING COMPANY 4-1/2% Convertible Subordinated Debentures, due July 1, 1980 who are similarly situated,

Plaintiffs-Appellants.

vs.

THE BOEING COMPANY (formerly BOEING AIRPLANE COMPANY), CLAIRMONT L. EGTVEDT, WILLIAM M. ALLEN, EDWARD C. WELLS, JAMES E. PRINCE, LOWELL P. MICKELWAIT, W.L. CAMPBELL, ARTEMUS L. GATES, CRAWFORD H. GREENEWALT, WILLIAM G. REED, D.E. SKINNER, THOMAS R. WILCOX, JOHN O. YEASTING and GEORGE H. WEYERHAEUSER,

Defendants-Appellees

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X
WILLIAM R. VAN GEMERT, et al., :
Plaintiffs-Appellants :
-against- : Docket No. 74-1157, etc.
THE BOEING COMPANY, et al., :
Defendant-Respondent. :
----- X

APPELLANTS' BRIEF

ISSUES

1. Do violations of stock exchange rules, promulgated pursuant to the Securities Exchange Act of 1934 for the benefit of public investors, give rise to civil liability?

The court below answered in the negative. Appellants respectfully submit that this issue should have been answered in the affirmative.

2. Are violations of such exchange rules civilly actionable only when the defendant has committed a fraud?

The court below answered in the affirmative. Appellants respectfully submit that this issue should have been answered in the negative.

3. Was defendant's violation of the publicity rules of the New York Stock Exchange mere negligence or tantamount to fraud?

The court below held that any such violation was by mere negligence. Appellants respectfully submit that a violation was caused by conduct tantamount to fraud.

4. When the publicity rules of the New York Stock Exchange require that a general news release of corporate actions affecting the rights of its security holders be immediately issued, specifies that the publication of a formal notice often specified in indentures is insufficient, and specifies that the requirements have been promulgated because of the general significance to holders of the security of such corporate action, has a corporation complied with such publicity rules when it issues no general news release until approximately three weeks after the corporate action, and publishes only the formal notice provided for in an indenture three to five days after such corporate action?

The court below answered in the affirmative. Appellants respectfully contend that the issue should have been answered in the negative.

5. Are the public security holders third party beneficiaries of provisions intended for their benefit in a listing agreement between a corporation and a stock exchange?

The court below answered in the negative. Appellants respectfully contend that the answer should have been in the affirmative.

6. Is the contract between the issuer and the holder of a convertible security a contract of adhesion so that the issuer may not cut off conversion privileges by merely following the notice provisions in such contract?

The court below answered in the negative. Appellants respectfully contend that the answer should have been in the affirmative.

7. Did the hostility of the court below to the plaintiffs' attorneys, and a ruling precluding the appropriate attorney for the plaintiffs from questioning witnesses, prevent the plaintiffs from obtaining a fair trial?

**Appellants respectfully submit that the answer to the
above issue is in the affirmative.**

STATEMENT OF THE CASE

A. Preliminary Statement

This is a class action involving a call of convertible debentures of The Boeing Company on behalf of those debentureholders who received no notice of the call, failed therefore to convert, and who consequently lost two-thirds of the value of their securities overnight because of the much higher market value of the common stock. It is the unusual case where all of the equities are on the plaintiff's side and even the prime defendant Boeing claims to have sought a way to obtain relief for the plaintiffs.

The call of debentures was made by the publication of formal notice as required by the Indenture buried in the vaults of The Chase Manhattan Bank, the Indenture Trustees. An Extraordinary 7.2% of the debentureholders did not see the notice and failed to convert. *(A214a, ¶155; A284a). Boeing claims it

*As appears herein, "A" refers to the appendix, the number immediately thereafter to the appendix page no., "E" to the separate volume of exhibits, and the number immediately thereafter to the exhibit no. as indexed in the volume of exhibits. Any page or section numbers appearing subsequent to the appendix page number or exhibit number refer to the pages or section of the document contained on such appendix page number or comprising such exhibit.

could not legally extend the conversion cut-off date although it was distressed by the plight of the non-converting debentureholders. (A823a-824a). While Boeing may have complied with the formal notice requirements of the Indenture, as will be shown below it failed to comply with rules of the New York Stock Exchange and with its Listing Agreement. Fortunately, under the law developed recently regarding liability for violation of stock exchange rules, as well as under existing common law (contract of adhesion and third party beneficiary concepts), this court can grant relief without plowing new ground on the basis of stipulated facts and without the necessity of a new trial.

The instant action is a consolidation, for all purposes, of eight different actions pursuant to the order of the court below dated October 4, 1966 (A83a). By the same order, the court below certified the consolidated action as a class action under Rule 23(b)(1) and (2) of the Federal Rules of Civil Procedure (A83a).

On June 29, 1971, the plaintiffs moved for summary judgment before the Hon. Sylvester J. Ryan. Judge Ryan, however, refused to decide the motion and, therefore,

the action was brought to trial. The action was tried, without a jury, before Judge Ryan, on November 15, 16, 17 and 20, 1972. The trial resulted in a decision, dated November 29, 1973, dismissing the action with costs to be taxed against the plaintiffs. (A283a). This appeal is from that decision and from the judgment entered pursuant thereto.

B. The Class and The Nature of Its Claim

The Boeing Company ("Boeing") had issued 4-1/2% convertible subordinated debentures due July 1, 1980 (the "Debentures") to its stockholders pursuant to a subscription offer. (A163a-164a; A168a, ¶30). Boeing purported to call the Debentures for redemption on April 8, 1966 and cut off the conversion privileges on March 29, 1966, pursuant to the terms of the indenture under which the Debentures were issued (the "Indenture"). Accordingly, Boeing refused to convert any of the Debentures received for conversion after the cut-off date of March 29, 1966. 7.2% of the Debenture holders, aggregating \$1,544,300 in face amount, did not convert by March 29, 1966 and, thus were affected by Boeing's refusal to convert thereafter. (A214a, ¶155; A284a). The class consists of those 7.2%, i.e., all present and former holders of the Debentures who

did not surrender their Debentures for conversion on or before the cut-off date and, thus, have been unable to convert.

The consequences to the members of the class resulting from Boeing's refusal to convert their Debentures are horrendous. On the cut-off date, i.e., March 29, 1966, a \$1,000 face amount Debenture was convertible into approximately \$3,162 in market value of Boeing stock so that it is clear that anyone having knowledge of the expiration date of the conversion privilege would have have converted the Debentures into common stock. On April 14, 1966, the date that Boeing stock had its highest market value within the 30-day period following the cut-off date, the Debentures would have been convertible into stock having a market value of \$3,640 for each \$1,000 face amount of the Debentures if Boeing had not refused to convert the Debentures at that time. Based upon the market value of Boeing stock on April 14, 1966 and the amount for which the Debentures were then redeemable, each of the members of the class suffered a loss of approximately 352% in the value of the Debentures by reason of their loss of conversion privileges, and the entire class suffered a loss in the aggregate amount of

\$4,026,762.25. The class's loss, based upon the market value on the cut-off date, was comparable. See A167a, ¶27 and A212a, ¶148; E4, pp. 33-34, §4.04.

Boeing did not provide the publicity of redemption, and of the cut-off of conversion privileges, required by Boeing's listing agreement with the New York Stock Exchange (the "Exchange") and the rules regarding publicity in Section A10 of the Exchange's manual ("Section A10"). Therefore, the defendant is liable to the class, in the amount of the above-described damages. Boeing is also liable to the class as third party beneficiaries of the Listing Agreement. Moreover, Boeing was not permitted to rely solely on the minimal publication requirements of the Indenture because the Indenture was a contract of adhesion.

C. The Requirements of Section A10 And The Listing Agreement

The parties have stipulated that Boeing had entered into the Listing Agreement with the Exchange (A165a, ¶18), and that Section A10 as well as the Listing Agreement were in effect at the pertinent times. (A205a, ¶130; A555a).

A copy of the Listing Agreement and Section A10 are included in the volume of exhibits (E8 and 43).

The Listing Agreement states that Boeing is to immediately publicize any actions it takes regarding the "rights or benefits pertaining to the ownership of its securities" (E8, §II, ¶4). Section A10 expressly refers to the pertinent section of the Listing Agreement and defines the word "publicity" as utilized in the Listing Agreement. More particularly, Section A10 states that a publication pursuant to the Listing Agreement requires the issuance of a "general news release", and expressly states that "a formal notice or advertisement of redemption sometimes required by provisions of an indenture" is insufficient. Section A10 also expresses the manner in which the news release must be issued, i.e., "by the fastest available means, i.e., telephone, telegraph or hand delivery" to one or more New York City newspapers or one or more of the national news wire services, and simultaneously to the Dow Jones news ticker. The necessity for such a prompt news release is specified in Section A10 as being "because of [the redemption's] general significance to holders of the security." (E43, p. a170). Boeing did not comply with Section A10.

**D. The Corporate Authorization For The
Redemption Of The Debentures**

After a number of meetings among officers and the legal counsel of Boeing, Boeing's Board of Directors authorized its officers to set dates for the redemption of the Debentures and the attendant expiration date of the conversion privileges, by passing the following resolution on February 28, 1966:

"RESOLVED, that the President, Vice-President - Finance, or Treasurer of [Boeing], or any one of such officers, is hereby authorized to take all such action as they or any one of them deems appropriate or necessary to call for redemption on a date to be selected by them or any one of them, all of the [Debentures] then outstanding . . . " (A200a, ¶119).

Pursuant to the Board's resolution, Boeing's officers set April 8, 1966 as the date for redemption and March 29, 1966 as the date for the expiration of the conversion privileges. (A295a).

Since Section A10 required Boeing to issue a news release of the dates promptly upon their being fixed by Boeing's officers, and Boeing issued no publicity whatsoever of the dates until March 8, 1966 (A446a-447a and 448a-449a), a determination of exactly when the dates were

fixed shows the degree of Boeing's non-compliance.

Although there was irrefutable evidence as to when the redemption and cut-off dates were set by Boeing's officers, the court below made no finding as to when they were fixed other than that tentative dates were discussed between March 2 and March 7, 1966. (A295a). However, a letter from Boeing to the bank trustee under the Indenture was introduced into evidence, dated March 2, 1966, informing the bank that the redemption date had already been selected as April 8, 1966 (A203a-204a, ¶126; A451a-453a; A684a). Indeed, that March 2, 1966 letter states, in part, "The redemption date we have selected is April 8, 1966."

There was additional evidence that the dates were set prior to March 4, 1966. Boeing's general counsel, Harold Olsen, testified that the redemption date and the date for publishing the notice were fixed at the same time (A517a-518a); and the parties stipulated that Boeing's attorneys revised a proxy statement on March 4, 1966, after the decision to make the first publication. (A205a, ¶132). Since March 4 was after the publication date was firmed up, and the publication date was firmed up at the same time as the redemption date, the redemption date was firmed up before March 4.

Harold Haynes, Boeing's Vice President, and Mr. Olsen testified that meetings were held between March 2 and March 4, 1966 for deciding upon the date for redemption and cut-off of conversion privileges. (A450a-451a; A509a). Even if Boeing's letter of March 2 is ignored, since the meetings ended on March 4, it is clear that the dates must have been fixed by then. Moreover, Mr. Olsen testified that "tentative" dates were agreed upon at these meetings as early as March 2, that no discussions arose thereafter during the meetings concerning the possibility of changing these "tentative" dates, and that these "tentative" dates remained unchanged (A519a-520a).

As an explanation of what was meant by classifying the dates selected on March 2, 1966 as "tentative", Mr. Haynes testified that the dates were tentative because "we could back away at any point in time until the publication appeared in the newspaper". (A455a). Thus, Mr. Haynes explained that the dates selected on March 2, 1966 were not tentative at all, but simply could be changed until such time that Boeing got around to publicizing them.

From the foregoing, it is seen that the evidence

supported only a conclusion that the dates were fixed on March 2, 1966 or, at the latest, prior to March 4, 1966.

E. The Steps Taken by Boeing to Publicize The Redemption and Cut-off of Conversion Privileges, and the Notice Thereof Given To the New York Stock Exchange

Boeing has admitted, in its response to plaintiffs' Demand for Admissions, that it "did not issue any general publicity release, as that term is defined in Section A10 of the New York Stock Exchange Company Manual, concerning the call of the Debentures during the period from March 1 through March 24, 1966." (A100a) Since Section A10 requires the issuance of publicity immediately (by hand, telephone or telegraph), any publicity issued subsequent to March 24, 1966 was untimely and, therefore, Boeing's admission is an admission that it violated the rule.

Although the Court did not so state in its findings of fact, there is substantial and uncontroverted

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evidence that Boeing had knowledge of the contents of Section A10 (even though such a finding is not necessary for the imposition of liability) and its specific publicity requirements at the time the redemption of the Debentures was authorized. Harold Haynes, Vice President of Boeing, admitted that Boeing had such knowledge during his testimony at the trial (A441a-443a). Indeed, Harold Olsen, then General Counsel of Boeing, testified that the publicity requirements of Section A10 had been the topic of discussion during meetings among the officers and legal counsel of Boeing both immediately before and after the authorization of redemption by Boeing's Board of Directors (A499a-501a). Notwithstanding its knowledge of Section A10's publicity requirements, Boeing did not comply therewith in publicizing redemption cut-off dates selected by its officers, but, at best, merely complied with the expressed requirements of the Indenture by publishing a formal notice of redemption. Thus, as will be shown below, Boeing completely ignored the statement of Section A10 that such publication of a formal notice of redemption, as specified by certain indentures, is insufficient, and that immediate publication of a general news release is required.

Boeing's awareness of the requirements of Section A10 is particularly evident because Boeing apparently complied with the requirements in giving publicity to the action taken by Boeing's Board of Directors on February 28, 1966, i.e., to the authorization of Boeing's officers to set the dates of redemption and cut-off of conversion privileges. Immediately after the Board of Directors' meeting, Boeing issued a general news release marked "for immediate use" which stated that Boeing's management was authorized to call the Debentures for redemption at an unspecified future date. As required by Section A10, this news release was distributed to New York newspapers, the national wire services and Dow Jones. (A200a-201a, #120). Also, apparently in accordance with the provisions of Section A10 requiring Boeing to notify the Exchange immediately as to the Board action, telephone calls were made from Boeing to the Exchange on the day of the Board meeting and on March 1, 1966 advising the Exchange of a tentative schedule. (A505a and A506a).

However, Boeing did not comply with Section A10 when it belatedly publicized the action taken by Boeing's officers in selecting the dates for the redemption and for the cut-off of conversion privileges.

Instead, Boeing complied, at best, with the expressed requirements of the Indenture and simply published formal notices of redemption on March 8, 1966 and March 10, 1966. However, even the March 8 publication was at least four days after the redemption dates had been fixed by Boeing instead of immediately thereafter as required by Section A10. Moreover, no general news release, stating the dates of the redemption and the cut-off of privileges, was issued until March 25, 1966, weeks after the action taken by Boeing's officers and only a few days before the cut-off date, instead of immediately after the action, as required by Section A10, by hand, telephone or telegraph. Moreover, neither the formal notices nor the March 25 release were issued to the Dow Jones news ticker as required by Section A10. See interrogatory 9 requesting the action taken to publicize pursuant to Section A10 and answer thereto read into the record (A446a-447a and 448a-449a); testimony of Mr. Haynes that there were no news releases other than mentioned hereinabove (A460a); concession made by defendant's counsel that Boeing did not issue any general publicity (A352a); and stipulation as to March 25, 1966 news release (A209a, ¶140).

ARGUMENT

POINT I

BOEING IS LIABLE TO THE PLAINTIFFS FOR ITS VIOLATION OF THE REQUIREMENTS OF SECTION A10 AND THE LISTING AGREEMENT BECAUSE SUCH REQUIREMENTS ARE AN EXTENSION OF THE SECURITIES EXCHANGE ACT OF 1934 AND AN INTEGRAL PART OF THE STATUTORY SCHEME FOR THE PROTECTION OF INVESTORS

A. The Derivation of Federal Civil Liability For Violations of Exchange Rules Such As Those Violated In The Case At Bar

This case raises the question of whether the violation of an Exchange rule designed to protect the public gives rise to liability on the part of the listed company violating the rule.

The right of a private party to sue for violations of the Securities Exchange Act of 1934 (the "Act"), and/or for violations of the SEC rules and regulations promulgated thereunder, has been repeatedly recognized by the courts. J. I. Case Co. v. Borak, 377 U.S. 426 (1964). It has now been well established that violations of stock exchange rules and rules of the N.A.S.D. promulgated for the benefit of the public investors, as opposed to internal "housekeeping" purposes, also give rise to causes of action

maintainable by private parties. Such stock exchange rules are promulgated pursuant to requirements of the Act, as are SEC rules and regulations and, thus, give rise to federal civil liability when violated, as do violations of SEC rules and regulations. Colonial Realty Corp. v. Bache & Co., 358 F. 2d 178 (2d Cir. 1966), cert. denied, 385 U. S. 817; Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, 410 F. 2d 135 (1969)(7th Cir. 1969), cert. denied 396 U.S. 838 (1969); Starkman v. Seroussi, CCH Fed. Sec. L. Rep., ¶94,600 (S.D.N.Y. 1974); SEC v. First Securities Co. of Chicago, 463 F. 2d 981, CCH Fed. Sec. L. Rep., ¶93,430 (7th Cir. 1972).

In the Colonial Realty case (supra), the Second Circuit, through the opinion of Judge Friendly, reviewed the cases pertaining to federal civil liability for violation of stock exchange rules and concluded that such liability does arise in some cases, depending upon the nature of the rule violated. In his opinion, Judge Friendly stated:

"A particular stock exchange rule could play an integral part in SEC regulation notwithstanding the Commission's decision to take a back seat role in its promulgation and enforcement and we would not wish to say that such a rule could not provide a basis for implying a private right of action.

What emerges is that whether the courts are to imply federal civil liability for violation of exchange or Dealer Association rules, by a member, cannot be determined on [a] simplistic all or nothing basis . . . ; rather the court must look to the nature of the particular rule and its place in the regulatory scheme . . .

In the Buttrey case (supra), the court cited and applied the Colonial Realty case and held that federal civil liability arose from the violation of Rule 405 of the Exchange, i.e. a relatively broad rule requiring brokers to "know their customer" which was promulgated for the purpose of protecting public investors as well as for purely internal "housekeeping" purposes. In so holding, the court explained Judge Friendly's statement in Colonial Realty (supra), that federal civil liability for violation of an exchange rule depends upon the nature of the particular rule, as follows:

"The touchstone for determining whether or not the violation of a particular rule is actionable should properly depend upon its design 'for the direct protection of investors' . . . Here, one of the functions of Rule 405 is to protect the public, so that permitting a private action for its violation is entirely consistent with the purposes of the statute."

In the Starkman case (supra), the Court, through the opinion of Judge Weinfeld, dealt with conduct which was in violation of Rule 345.17 of the Exchange, a narrower

rule than Rule 405, which prohibits registered representatives from guaranteeing any customer against loss in his account or receiving a share in the profits of any customer's account or sharing in any of the losses sustained, as well as Rule 405. The Court, also citing and applying the Colonial Realty case (supra), held that the violation was actionable because Rule 345.17 was for the protection of the public and because the violation was of the public protective aspects of Rule 405. The Court stated:

" The rule [345.17] which [defendant] is charged with violating is not a broad, generalized one, 'something of a catch-all' with vague or uncertain contours that may lend itself to varying interpretations, so that it could reasonably be argued that it was beyond congressional purpose that its violation would give rise to civil claim under federal law. The rule here is precise . . . ; clearly it is aimed at protecting the customer from being drawn into questionable transactions or speculative activities far beyond his purse; other purposes are obvious not only for the protection of the customer but also the public at large, as well as the securities industry itself. . . . So, too, Rule 405 . . . is precise and has among its purposes protection of the customer qua customer. The rules here allegedly violated may be considered 'an integral part in SEC regulations in furtherance of the purpose declared in Section 6(d) to insure fair dealing and to protect investors.' " (Ibid. at p. 96,127)(emphasis added).

In SEC v. First Securities of Chicago (supra), the Court held that violations of an N.A.S.D. rule "provide a

basis for private damage actions where the rule violated serves to protect the public." (Ibid. CCH at p. 92,139).

From the Colonial Realty case (supra), the Buttrey case (supra), the Starkman case (supra) and the SEC case (supra), it can be seen that violations of exchange rules or portions thereof promulgated to protect public investors give rise to federal civil causes of action, whereas violations of rules promulgated solely for exchange internal "housekeeping" purposes do not.

In the case at bar, there can be no doubt that the publicity provisions of Section A10 and the Listing Agreement, which were violated by Boeing, were promulgated for the sole purpose of protecting public investors. Indeed, the section expressly states that such is its purpose as follows:

"Emphasis is placed upon the necessity of promptness in releasing news regarding redemption . . . because of its general significance to holders of the security."
(E43, p. a170.)

Thus, unlike the broad Rule 405 dealt with in the Buttrey case (supra), which contains aspects for internal "housekeeping" purposes as well as for the benefit of the public, the violation of the publicity rules of Section A10,

which occurred in the case at bar, must necessarily give rise to federal civil liability.

B. The Reasoning of the Court Below, In Deciding That Boeing's Violations of Section A10 and the Listing Agreement Did Not Give Rise to Federal Civil Liability, Is Erroneous

In its opinion, the court decided that Boeing was not liable to the class for its violations of Section A10 and the Listing Agreement by (1) baldly concluding that Boeing did comply with the publicity requirements of the Exchange, in the face of Boeing's binding admission and uncontroverted evidence otherwise, (2) arguing that the Stock Exchange manual is not a rule of sufficient importance so that a violation thereof creates civil liability, (3) contending that the cases of O'Neill v. Maytag, 339 F. 2d 164 (2d Cir. 1964); Colonial Realty Corp. v. Bache & Co. (supra) and DeRenzo v. Levy, 297 U. Supp. 998 (S.D.N.Y. 1969), establish that this circuit does not recognize civil actions for violations of exchange rules, (4) attempting to interpret the Buttrey case (supra) as holding that violations of exchange rules are civilly actionable only against members, as opposed to listed companies, and only when such member

is charged with fraud. (A312a-313a). As will be shown below, each of these arguments is erroneous.

- (1) The Conclusion By the Court Below That
Boeing Did Comply With the Publicity
Requirements of the Exchange Is Completely
Contrary to Boeing's Admission and to the
Uncontroverted Evidence

The Court below has made the bald statement that "Boeing did comply with the publicity requirements of the Exchange" even though Boeing admitted its non-compliance in response to plaintiffs' Demand for Admissions (A100a, request 12). Since FRCP 36(b) states that such an admission is conclusive, the Court's conflicting determination is erroneous as a matter of law. Even without regard to Boeing's admission of a violation, however, it will be shown below that the lower court's determination of compliance should be reversed in view of the uncontroverted evidence to the contrary, as an erroneous conclusion of law* or as a clearly erroneous factual finding.

It is well established that the Court of Appeals will reverse findings of fact by the District Court

*It is to be noted that the court's statement did not appear under the portion of its opinion devoted to its findings, but appeared under the portion where legal conclusions were set forth.

when such findings are completely unsupported by the evidence and, thus, clearly erroneous, particularly in a non-jury trial such as here. FRCP 52(a); State Farm Mutual Auto Insurance Co. v. Liverett, 475 F. 2d 188 (CA Misc. 1973); Carter v. Aetna Casualty & Surety Co., 473 F. 2d 1071 (CA Ark. 1973); Rewis v. U. S., 445 F. 2d 1303 (CA Ga. 1971); Fuchstadt v. U. S., 442 F. 2d 400 (2d Cir. 1971); Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 524 v. Bilington, 402 F. 2d 510 (CA Wash. 1968); Welch v. Beto, 400 F. 2d 582 (CA Tex. 1968). Here, not only is the finding of compliance unsupported, but uncontroverted evidence leads to the opposite conclusion.

In holding that Boeing complied with the Exchange rules, the Court completely ignored (1) the express statement of Section A10 that a "formal notice or advertisement of redemption sometimes required by provisions of an indenture" is insufficient, and (2) the specific requirements for publicity under Section A10 which were not followed.

No general news release of the redemption and cut-off dates was published as required by Section A10 until March 25, 1966, weeks after the action was taken by Boeing's officers

and only a few days before the cut-off date for conversion rights. Instead, Boeing publicized the dates by publication of formal notices of redemption. However, Section A10 expressly provides that such formal notices are insufficient and that a prompt general news release must be issued. Moreoever, there was no release to Dow Jones of the dates as required by Section A10. This was proven by Boeing's response to plaintiffs' interrogatory requesting the action taken to publicize pursuant to Section A10 (A446a-447a and 448a-449a), by Boeing's counsel's concession that Boeing issued no general publicity (A352a), and by the testimony of Mr. Haynes that no general news releases were issued other than that of March 25, 1966 and that of February 28, when the dates had not yet been set. (A460a). Such evidence, moreover , was uncontroverted.

The March 25 general news release unquestionably was not in compliance with Section A10 because the Section requires the publicity to be made promptly and by the fastest means available. The delay of three weeks cannot conceivably meet this strict criterion. The release also failed to comply since it was not issued to Dow Jones & Company, Inc. as required by Section A10. See answer to plaintiffs' interrogatory showing that only the release of

the February 28, 1966 Board meeting was issued to Dow Jones and that release did not contain the conversion and cut-off dates. (A446a-447a and 448a-449a).

Even if Boeing contends that the formal notice performed the function of a general news release (which Section A10 expressly refutes) and even if the formal notice had been released to Dow Jones (which it was not), Boeing still failed to meet the strict timing requirements of Section A10. Boeing sent a letter to the bank trustee on March 2, 1966 fixing the redemption date. (A684a). Publication of the formal notice did not take place until March 8, 1966. (A446a-447a and 448a-449a). The lower court's finding that "tentative" dates were discussed between March 2 and March 7 (A295a) is not only contrary to the evidence, but is clearly erroneous (and hence reversible) because it is based on a misinterpretation of what Boeing's witnesses meant by "tentative". As shown on page 13 hereof, the dates were "tentative" only in the sense that Boeing had the power to change them until they were publicized, which is true of any executory decision. Therefore, the dates were not really tentative, they were fixed but could be changed until Boeing got around to publicizing them.

In view of the foregoing, the lower court committed reversible error in concluding that Boeing complied with the requirements of the Exchange. To hold that formal notices required by the Indenture (which are insufficient by the terms of Section A10), and that a news release issued three weeks later (which, even if it had been timely, didn't comply), complied with Section A10 is to make a mockery of the Rule's purpose, which is to insure security holders of sufficient notice of important events such as the loss of conversion rights through redemption.

(ii) The Court Below Erred In Holding That Violations of Sections of The Stock Exchange Manual Do Not Give Rise to Civil Liability

Although the above cited cases show that stock exchange rules, promulgated for the benefit of the investing public, are actionable, the Court below states that violations of the manual are not actionable. Apparently the court draws the distinction between violations of sections of the manual promulgated for the public benefit, such as Section A10, and of exchange rules specifically denominated as "rules". However, such distinction is without merit.

The cases clearly show that a violation of the

Listing Agreement is equivalent to a violation of a "rule" insofar as civil liability therefrom is concerned. In the Colonial case (supra), Judge Friendly equated the violation of a listing agreement with a violation of exchange "rules" by dealing with the O'Neill case (supra), where a violation of a listing agreement was involved, in the same context as rule violations. In the instant action, by violating the publicity requirements of Section A10 of the manual, Boeing violated the publicity requirements of the Listing Agreement. Section A10 states:

"Publicity: The term 'publicity'. . . as used in the listing agreement in respect of redemption action, refers to a general news release, and not to the formal notice or advertisement of redemption sometimes required by provisions of an indenture or charter." (Emphasis added)

The distinction between violations of exchange "rules" and Section A10 and the Listing Agreement is seen to be even more preposterous when it is realized that the theory upon which civil liability attaches for the violation of exchange "rules" applies equally well to violations of Section A10 and the Listing Agreement. The liability for violations of a "rule" arises from sections of the Act which require exchanges to promulgate certain "rules of the Exchange",

e.g., Section 6. "Rules of the Exchange", however, clearly include provisions of the manual, such as Section A10 and the Listing Agreement, because, as defined in Section 6(a)(3) of the Act:

"'Rules of the Exchange' include any exchange's constitution, articles of incorporation, by-laws, rules or instruments corresponding thereto, whatever the name.'" (Emphasis added)

Thus, it is clear that since Section A10 of the manual and the Listing Agreement are "instruments corresponding thereto", they were promulgated pursuant to the Act in the same manner as were stock exchange "rules".

By holding that Boeing is not liable for its violations of Section A10 and the Listing Agreement, the lower court has allowed Boeing to take a "heads I win, tails you lose" position. The holding makes the holders of the Debentures bound by the grossly inadequate, highly technical provisions of the Indenture (to which the holders of the Debentures are not even a party), but does not bind Boeing to its Listing Agreement or the detailed requirements thereunder pursuant to Section A10. One is hard pressed to accept such logical and legal inconsistency. Boeing can be no less bound by its Listing Agreement than it claims the holders of the Debentures are bound by the Indenture.

The Court below cites the case of Weinberger v. The New York Stock Exchange, 355 F. Supp. 139 (S.D.N.Y. 1971), in support of its erroneous holding that a violation of the manual does not give rise to a civil action. However, the Weinberger case has nothing whatsoever to do with this point. In Weinberger, the plaintiff claimed to be a third party beneficiary of a contract between the defendant exchange and the SEC requiring the exchange to supervise its employees. The court held in favor of the plaintiff on a contractual theory. Moreover, the court explained that the only reason that the action was brought on a contractual theory, rather than on a theory of civil liability deriving from the Act, was because the latter theory was barred by the Statute of Limitations whereas the contractual theory was not. Weinberger in fact supports plaintiffs' position set forth in Point II hereof.

(iii) The O'Neill, Colonial Realty Corp. and DeRenzo Cases Do Not Establish That the Law In This Circuit Is That Violations of Exchange Rules Are Not Civilly Actionable

In citing Colonial Realty Corp. v. Bache & Co., 358 F. 2d 178, for the proposition that violations of exchange

rules are not civilly actionable, the Court below ignored the portion of Judge Friendly's opinion, quoted on pages 19-20 hereof, stating that some stock exchange rules are civilly actionable, depending upon "its place in the regulatory scheme".

In citing O'Neill v. Maytag, 339 F. 2d 764, for the proposition that violations of exchange rules do not provide federal civil liability, the court below completely ignored Judge Friendly's interpretation of the O'Neill case in the Colonial Realty case (supra).

In the Colonial Realty case (supra), Judge Friendly cited and interpreted the O'Neill case as holding that there are no "general . . . private rights of action for alleged violation of stock exchange rules." However, Judge Friendly then went on to state that the holding in O'Neill and other cases reveals that the "court must look to the nature of the particular rule and its place in the regulatory scheme" in determining whether or not there is civil liability for the violation thereof. Thus, the Second Circuit in the Colonial Realty case stated that the O'Neill case did not hold that civil liability would never arise for the violation of an exchange rule, regardless of the purpose of such rule

in the regulatory scheme promulgated by the Act, but merely that such liability would not arise unless the violated rules were promulgated to protect public investors. Thus, the holding of O'Neill would be completely inapplicable to the instant case wherein the violation is of an exchange rule expressly promulgated for the purpose of protecting public investors.

The case of DeRenzio v. Levy, 297 F. Supp. 998 (S.D.N.Y. 1969), cited by the court below is easily distinguishable from the instant action. In DeRenzio, the court held that the violation of the exchange rule there in question was not actionable because it was contrary to the governing statutes, the Investment Company Act and the Investment Advisors Act, which were passed subsequent to the promulgation of the rule. The court stated its holding as follows:

"[That an exchange rule is privately enforceable can] not be true of a rule found to be at war with the governing federal statutes, and that, finally, is the plainest vice in plaintiff's theory." Ibid. at p. 1002.

In the case at bar, there is no conflict between the publicity requirements of the Exchange and any governing statute. Therefore, the DeRenzio case is completely inapplicable.

(iv) Violations of Exchange Rules Are Actionable Even When The Defendant Has Not Committed a Fraud

One of the ways in which the Court below has attempted to distinguish Buttrey v. Merrill Lynch, 410 F. 2d 135, a case holding that there is civil liability for a violation of Rule 405 of the Exchange, is to claim that Buttrey required that the violation be tantamount to fraud in order to be civilly actionable and held that mere negligence might not support a federal claim. Apparently, the Court below misunderstood a portion of the decision which states:

"Although mere errors of judgment by the defendant might not support a federal cause of action, the facts alleged here are tantamount to fraud. . . thus giving rise to a private civil damage action."

An examination of the above quoted portion of the decision, in the context of the entire opinion, however, reveals that the Court in Buttrey did not hold that acts tantamount to fraud are required for liability under any rule intended solely for the protection of public investors, such as the publication requirements of Section A10 violated by Boeing. The court merely held that when the violation of a broad rule is in question, such as Rule 405, which contains aspects for internal "housekeeping" purposes as well as for the protection of the public, the facts of the particular case may have to be examined to determine whether

the violation is of the protection of the public aspect of the rule and hence actionable. The court was dealing with a broad rule and therefore noted that an examination of the facts before it, i.e., that fraud was involved, assured that the public protective aspects of the rule had been transgressed.

In Buttrey, the Court first quoted from Judge Friendly's opinion in the Colonial Realty case (supra) that "the court must look to the nature of the particular rule and its place in the regulatory scheme" to determine if civil liability for its violation exists. Then the Court went on to state, "the touchstone for determining whether or not the violation of a particular rule is actionable, should depend upon its design for the direct protection of investors". Thus, the Court in Buttrey expressly stated that it is the purpose of the rule which determines whether or not civil liability will arise and not the nature of the way the rule is violated. The Court then explained why, in its particular situation, it had to examine the way the rule was violated, as follows:

"Here one of the functions of Rule 405 is to protect the public, so that permitting a private action for its violation is entirely consistent with the purpose of the statute. We do not decide that an alleged violation of Rule 405 is, per se, actionable."

Thus, the Court in Buttrey said liability depended upon the nature of the particular exchange rule violated, and that when a rule, such as 405, has aspects for the protection of the public, as well as aspects for the purpose of internal "housekeeping", it is not per se actionable. Clearly, such a rule containing both aspects could not be actionable, per se, because violations of only its public protection aspects give rise to civil liability. However, when the rule involved is only for the benefit of public investors, such as the publicity requirements of Section A10 in the case at bar, a violation thereof is per se actionable.

It was in that context, i.e., when the violation is of a broad rule such that a mere error of judgment might be indicative of only the "housekeeping" aspects thereof, that the court noted that, under its specific facts, mere errors of judgment might not be civilly actionable. The Court mentioned the nature of the violation, holding that it was tantamount to fraud, only in examining the facts before it to establish that the violation was of the public benefit aspects of the broad Rule 405. In the instant case, as distinguished from the Buttrey case, there are no housekeeping aspects of Section A10 so that it is actionable, per se, without proof of fraud.

In SEC v. First Securities Co. of Chicago (supra) the Seventh Circuit interpreted its decision in Buttrey as holding that liability for violation of an Exchange rule depended upon whether the rule was for the protection of the public and not upon the presence of fraud. In that case, the defendant broker-dealer was held liable for violating Rule 27 of the NASD (the rule requiring members to supervise their registered representatives), when it permitted its former President to direct that only he would open mail to his attention, even though the broker was in no way fraudulent in violating the rule.

The Court cited Buttrey in stating the basis for its holding, i.e., that liability depends only upon the rule being for the public's benefit, and thereby clearly showed that Buttrey does not require fraud for liability when such a rule is violated. The Court stated:

"We have no doubt that the enforcement of [the past President's] rule regarding the opening of mail is sufficient without more to constitute a violation of Rule 27. Such violations provide a basis for private damage actions where the rule violated serves to protect the public. Avern Trust v. Clarke, 415 F. 2d 1238, 1242 (7th Cir. 1969); Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra at 142-143." (emphasis added) (Ibid CCH at p. 92, 139.)

In Starkman v. Seroussi (supra), wherein Buttrey was also cited, Judge Weinfeld held that Rule 345.17 and Rule 405 of the Exchange were civilly enforceable, without requiring an

allegation of fraud. As shown from the quotation from that case, on page 21 hereof, Judge Weinfeld found liability because of the nature of the rules violated, i.e., rules designed to protect the public. Thus, Judge Weinfeld recognized that it might be necessary to find fraud only if it was not clear whether there was a violation of the public protective or housekeeping elements of a rule containing both elements. In the instant action, where the rule violated is solely for the public benefit, as in Starkmen there is no need to examine the particular facts of the case (e.g. to determine if fraud was present) to establish a violation against the public and hence liability.

The contention of the Court below, that a merely negligent violation of an appropriate exchange rule is not actionable, is also contrary to the holding of Judge Bonsal in Isaacs v. Chartered New England Corp., 72 Civ. 2723, N. Y. Law Journal, July 2, 1974 at p. 1. In Isaacs, the Court held that there was liability for the negligent violation of the Rule of the N.A.S.D. requiring broker-dealers to supervise their employees. Obviously, as in the instant action, the rule violated was promulgated for the protection of the public and was, thus, a per se violation.

Although the Court below cited Bush v. Bruns Nordeman & Co. CCH Fed. Sec. L. Rep., ¶93,674 (S.D.N.Y. 1972), as interpreting Buttrey to mean that civil liability exists only when defendant is charged with fraud, the Bush case stated quite the contrary. The Court in Bush said that Buttrey held that some violations of Rule 405 of the Stock Exchange were civilly actionable. Unlike the Court below, the Court in Bush did not say that only fraudulent violations of Rule 405 were actionable. Indeed, by interpreting Buttrey as holding that some violations of Rule 405 are civilly actionable, the Court in Bush is in complete accord with the plaintiff's interpretation, to wit: that Buttrey held that violations of Rule 405 which are actionable are those violations of the public benefit aspects of a rule.

Plaintiff's reading of Buttrey is supported by the leading article dealing with civil liability violations of Exchange rules. In "Liability Under Exchange Rules" by Lewis L. Lowenfels, the language in Buttrey referring to fraud is noted but the article concludes:

"Concisely stated, exchange rules which are promulgated for the direct protection of the investing public should give rise to private actions against an exchange and other private parties, while rules promulgated merely as 'housekeeping' devices to guide the membership should not. Both logic and policy support such a distinction.

. . . The most difficult problem, of course, is to attempt to classify exchange rules into either [the public protective category or housekeeping category]. Certain rules will fit rather easily into one category or the other; other rules will defy precise classification and only the particular facts of the specific case will enable one to reach a determination." (emphasis added) (Lowenfels, Liability Under Exchange Rules, The Review of Security Regulation, Vol. 2, No. 17, Oct. 6, 1969).

Any doubt that fraud is not required for liability in the instant action must be removed when it is realized that Boeing had a fiduciary duty to the plaintiffs.

In Gerstle v. Gamble Skogmo, Inc. 478 F 2d 1281, CCH Fed. Sec. L. Rep. ¶93,983 (2d Civ. 1973), this Court, through the opinion of Judge Friendly, held that fraud is certainly not necessary for liability for a false and misleading proxy statement because of the fiduciary duty owed by those in control, who prepared the statement, to the minority shareholders who were misled. Judge Friendly stated:

". . . a broad standard of culpability here will serve to reinforce the high duty of care owed by a controlling corporation to minority shareholders. . .

We thus hold that in a case like this . . . [plaintiffs] are not required to establish any evil motive or even reckless disregard of the facts." (Ibid at p. 93,942).

In the instant action, as in Gerstle, the defendant corporation was dealing with its minority shareholders* and thus

*Since the Debentures were issued as a subscription offer to Boeing's shareholders (A163a-164a; A168a, Par. 30), the Debentureholders were shareholders of Boeing.

had a fiduciary duty to them which was not violated only by a showing of fraud. In the Buttrey case, where a violation by a member firm damaging a customer was involved, there was no fiduciary relationship to a corporation's minority shareholders as in Gerstle and the instant action. Therefore, if the necessity for fraud was even colorably a requirement for liability in Buttrey, it is not here.

Indeed, the instant action presents a far stronger case for imposing liability than does Buttrey because:

- (1) Section A10 is designed solely to protect the public, while the "Know Your Customer" rule is designed for housekeeping purposes as well;
- (2) The duties imposed by Section A10 are very specific, unlike the vague generability of the "Know Your Customer" rule;
- (3) Section A10 is buttressed by a specific agreement, i.e., the Listing Agreement; and
- (4) The violation in the instant action was a breach of the fiduciary duty owed to a corporation's minority shareholders were as in Buttrey no such fiduciary duty was involved.

Finally, it should be noted that the issue of fraud seems only to arise in the context of amorphous rules such as Rule 405 where an act or course of conduct is not clearly a violation but requires a factual evaluation and value judgments. It would not be sensible to require a finding of fraud for violation of a very specific rule, such as Section A10, where (1) the defendant can tell precisely when and how he is committing a violation and (2) the Rule is clearly designed solely for the protection of the public.

- (v) The Case of McMaster, Hutchison & Co. v. Rothchild & Co., CCH Fed. Sec. L. Rep. 793,541 (D.C.N.D. Ill. 1972), Cited By The Court Below, Erroneously Interprets The Buttrey Case and Its Reasoning Is Unsound

In erroneously concluding that the Buttrey case held that exchange rule violations are civilly actionable only in the presence of fraud, the court below cited a case from a District Court in Illinois, McMaster, Hutchison & Co. v. Rothchild & Co. (supra). The McMaster case did hold that there is no federal civil liability for violation of stock exchange rules and that such liability was found in the Buttrey case (supra) only because the element of actual fraud was present therein. However, an examination of the court's opinion in the McMaster case (supra) shows that its reasoning is erroneous and that its conclusions, both as to

the existence of federal civil liability for the violation of exchange rules and as to the interpretation of the Buttrey case, are wrong. It is respectfully suggested, therefore, that this court should not follow the erroneous opinion of McMaster.

In the McMaster case, the court commences its reasoning by referring to Section 27 of the Act which provides for exclusive federal jurisdiction over "violations of this Chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this Chapter or the rules or regulations thereunder." The opinion then states that the words "rules and regulations" do not include exchange rules and, therefore, the court concludes that there is no federal civil liability for violations of exchange rules. However, even if it is assumed, arguendo, that actions arising from violations of exchange rules do not come within the ambit of Section 27, only exclusive federal jurisdiction would be eliminated. The federal courts would still have concurrent jurisdiction under 28 U.S.C. Section 1331 and 1337. Judge Friendly concurred with the foregoing in his opinion in the Colonial case (supra) when he stated that acceptance of the argument that federal

Jurisdiction is not obtained under Section 27 of the Act for violations of exchange rules "would not foreclose a contention that there might still be a federal claim of which district courts would have concurrent jurisdiction under 28 U.S.C. Section 1331, 1337." Moreover, even though the words "Rules and regulations" in Section 27 do not include exchange rules, actions arising from violations of exchange rules are still covered by this section because they are included within the meaning of the words "actions . . . brought to enforce any liability or duty created by this Chapter" therein.

Buttrey v. Merrill Lynch, Pierce, Fenner & Smith (supra).

The court in McMaster then reasons that, because the Act indicates that exchanges ought to be self-regulating bodies, only exchanges can enforce their own rules. However, a self-regulating body does not necessarily have the exclusive right to enforce its own rules; it merely has the right to make its own rules. The SEC is also a "self-regulating" body, even more so than exchanges. Yet it is clear that private parties can bring suit for violations of SEC rules. It would be inconsistent, therefore, to state that private liability does not exist for violation of exchange rules, merely because exchanges are

self-regulating, while recognizing such private liability for violations of SEC rules. Moreover, the court in McMaster is wrong when it states that exchanges are entirely self-regulated. Section 19(b) of the Act states, in part, "The [SEC] is further authorized . . . by rules or regulations or by order to alter or supplement the rules of [exchanges] . . . in respect of such matters as . . . (3) the listing or striking from listing of any security . . . and (13) similar matters." Thus, Section 19(b) renders exchange rules completely subject to the rules of the SEC and, thus, exchanges are far from self-regulating.

The court in McMaster then argues that the doctrine of federal supremacy over state law precludes violations of exchange rules from being civilly actionable. It notes that the recognition of federal civil liability for violation of exchange rules is tantamount to making exchange rules equivalent to federal law. Therefore, the court argues that, since federal law has supremacy over inconsistent state law, exchange rules must have supremacy over state law. However, the argument continues, the Act provides that "nothing in this Chapter shall be construed to prevent any exchange from adopting and enforcing any

rule not inconsistent with . . . the applicable laws of the state in which it is located." Thus, the court concludes that the above quoted portion of the Act dictates that exchange rules may not have supremacy over local rules and, therefore, cannot be treated as federal law while maintaining the principles of federal supremacy.

The above logic of the court in McMaster is ridiculously fallacious. It is true that the recognition of federal civil liability for violation of exchange rules make such rules equivalent to federal law. It is also true that when federal and state law are in conflict, the federal law must govern. However, Congress may, and often does, intentionally preserve certain areas of law to be governed by local law by refraining from enacting inconsistent federal legislation with respect to such areas. The above quoted portion of the Act is nothing more than the implementation of Congress's intent to preserve this area of law for governance by local law, i.e., Congress precluded the enactment, through the adoption of exchange rules, of legislation inconsistent with local law by not permitting exchanges to adopt such inconsistent rules. Nothing in the Act, however, indicates that the exchange

rules which may be promulgated, i.e., which are consistent with local law, are to have anything less than the force of federal legislation.

Although the court in the McMaster case attempts to reconcile its holding with the Buttrey case, it is clear that McMaster is directly contrary to Buttrey. Firstly, as noted above, McMaster reached its decision by reasoning that violations of an exchange rule are not within the ambit of Section 27 of the Act, whereas Buttrey reached an opposite conclusion by reasoning that such violations are covered by Section 27. Secondly, McMaster's attempt to distinguish Buttrey, i.e., by stating that actual fraud was present in Buttrey, is a false distinction, even if it is assumed, arguendo, that its interpretation of Buttrey is correct. McMaster held that there is no federal civil liability for violation of exchange rules, whether or not the facts are tantamount to fraud and, thus, would not have found such liability even if the facts therein were identical to the facts in Buttrey.

As shown above, the court's interpretation of the Buttrey case is wrong. Federal civil liability was found in Buttrey, not because of the presence of acts tantamount to fraud, but because the acts were violations of aspects

of Rule 405 promulgated for the benefit of the public. The fact that the acts were tantamount to fraud in Buttrey was merely indicative that the violation was of the public protective aspects of the rule. As expressly stated in Buttrey, "the touchstone for determining whether or not the violation of a particular rule is actionable should properly depend upon its design 'for the direct protection of investors'". Thus, not only did the court in McMaster fail to distinguish Buttrey from its holding, but it failed to correctly interpret the case.

Finally, the court in McMaster's reliance upon the case of Aetna Casualty & Surety Co. v. Paine, Webber, Jackson & Curtis, CCH Fed. Sec. L. Rep. ¶92,748 (N.D. Ill. 1970) is misplaced because, in Aetna, like in Buttrey (*supra*), a violation of the broad Rule 405 was involved and not a violation of a narrow rule, as in the case at bar, designed solely for the protection of public investors. Moreover, the court in Aetna expressly stated that its holdings and views were limited to a violation of a broad rule such as Rule 405.

From the foregoing, it can be seen that every aspect of the court's reasoning in the McMaster case is

erroneous and completely contrary to the reasoning and holding of the Court in the Buttrey case (supra), the opinion of Judge Friendly in the Colonial Realty case (supra) and the holding by Judge Weinfeld in the Starkman case (supra), and the holding of the court in the SEC case (supra).

(vi) The Uncontroverted Evidence Shows That Boeing's Violations Were Tantamount To Fraud

Although a finding that Boeing's violations of Section A10 in the case at bar were "tantamount to fraud" is not required to give rise to civil liability therefor, Boeing's violations were, in fact, tantamount to fraud to the same extent as the violations in the Buttrey case (supra) were. As shown on pages 14 through 16 hereof, Boeing had knowledge of the publication requirements of Section A10 and the Listing Agreement at the time they failed to comply*but nevertheless decided to comply only with the publication requirements of the Indenture and ignore those of the Exchange. In Buttrey, it was nothing more than "knowledge ascribed to defendant", which the court deemed "tantamount to fraud". Thus, Boeing's knowledge of the substance of Section A10, and wilful failure to

* Although the lower court did not state whether or not it found that Boeing had such knowledge, the uncontroverted evidence makes such a finding a conclusion of law or the lack of such a finding clearly erroneous and, thus, reversible error as explained on pages 24-25 hereof.

comply therewith, is no less tantamount to fraud than were the acts of the defendants in Buttrey. Therefore, even if it is assumed, arguendo, that only violations "tantamount to fraud" give rise to civil actions, the violations of Boeing in the case at bar would give rise thereto.

(vii) The Lower Court's Distinguishing of Buttrey, Upon The Basis That The Violation Was By A Member Company, Rather Than A Listed Company, Is Meritless

The lower court also attempted to distinguish the Buttrey case from the instant action by noting that, in Buttrey, it was a member company that violated an exchange rule rather than a listed company. However, violations of exchange rules and listing agreements by listed companies, such as Boeing, are as actionable as violations by member companies.

The reasons for holding members of exchanges civilly liable apply equally to holding listed companies liable. Members may be held civilly liable because the Act requires exchanges to adopt rules regulating members, e.g., Section 6(b) of the Act, and such exchange rules pursuant to the requirements of the Act are deemed to be extensions of the Act and part of the statutory regulatory

scheme. However, the Act also contains sections requiring exchanges to adopt rules which are for the benefit of the general investing public and which apply to the regulation of listed companies as well as to members. Indeed, section 19(b)(3) of the Act refers expressly to the regulation of listed companies in that it allows the SEC to override exchange rules with respect to such matters as, inter alia, "(3) the listing or striking from listing of any security." Similarly, Section 6(d) of the Act permits registration of an exchange only if its "rules of the exchange" are "adequate to ensure fair dealing and to protect investors", and in no way is limited in its applicability to members only. Thus, it is clear that "rules of the exchange" applying to listed companies are as much an extension of the Act as "rules of the exchange" applying to members and, therefore, violations are equally actionable.

The fact that civil liability for violations of exchange rules arises against listed companies as well as against members was indicated by Judge Friendly in the Colonial case (supra). In that case, Judge Friendly discussed the O'Neill case which involved a claim for liability against a listed company and not a member. Judge

Friendly set forth the rule of law to be derived from the O'Neill case, i.e., that civil liability would not be found for a violation of every exchange rule, and in so doing did not state that liability was denied in O'Neill because a listed company was involved rather than a member. Moreover, in his opinion, immediately after discussing the O'Neill case and propounding the rule of law therefrom, Judge Friendly discussed Section 19(b) of the Act, which expressly refers to listed companies, to find that a violation of some exchange rules would create liability. Thus, Judge Friendly, in the Colonial case, clearly implied that whether the violator was a listed company or a member is not a factor to be considered.

In the aforementioned article written by Lewis Lowenfels in the "The Review of Securities Regulations", it is stated that the Colonial and Buttrey cases mean that:

"Private liabilities under exchange rules may be sustained not only against investment banking firms, but also against listed companies that violate the terms of their listing agreements."

Thus, Lowenfels recognizes that the law enunciated in Colonial and Buttrey is applicable to

violations by listed companies and that the defendants in those two cases just happened, fortuitously, to be members. The distinction between a listed company and a member in the matter here in question, is immaterial. An earlier article* by Mr. Lowenfels on the same subject was cited by Judge Friendly, in the Colonial case (supra), with approval.

C. The Damages To The Plaintiffs Are Based Upon The Highest Market Value Of The Common Shares Within a Reasonable Time After Boeing Refused to Convert the Debentures

By wrongfully refusing to convert the Debentures, Boeing deprived the plaintiffs of their right to do so and thus are liable for the conversion of that right.

It is well established that damages for conversion are generally based upon the market value of the converted property at the time of the conversion. National Dairy Products v. Lawrence Am Field Warehousing Corp., 22 A.D. 2d 420; Jones v. National Chautauqua County Bank of Jamestown, 272 App. Div. 521. However, when the converted property has a fluctuating value, such as securities do, the damages are based upon the highest market value of the

*Lowenfels, Implied Liabilities Based Upon Stock Exchange Rules, 66 Colum. L. Rev. 12,25-28 (1966) cited in footnote 4 of Colonial (supra)

property within a reasonable time after the conversion is learned of by the plaintiff. Jones v. National Chautauqua County Bank of Jamestown (supra); Gelb v. Zimet Bros., Inc., 34 Misc. 2d 401, affirmed 18 A.D. 2d 1967.

The value of the plaintiffs' right to convert the Debentures fluctuated and, thus, is subject to the rule that the plaintiffs are entitled to damages based upon the highest market value of their right within a reasonable time after March 29, 1966, i.e., the date Boeing cut off conversion privileges. In the instant case, such highest value of the Boeing common stock was reached within 30 days after the cut-off date and was \$182.00 per share on April 14, 1966. As shown on pages 58-9 hereof, this resulted in damages to the class amounting to \$4,026,762.25.

Even using March 29, 1966 as the date for measuring damages, when the value of Boeing stock was \$158.125 per share, plaintiffs are entitled to damages of \$3,162 per \$1,000 Debenture.

POINT II

PLAINTIFFS ARE THIRD PARTY BENEFICIARIES OF THE LISTING AGREEMENT BETWEEN BOEING AND THE EXCHANGE. THEREFORE, BOEING IS LIABLE TO THE PLAINTIFFS FOR ITS BREACH.

Since the publication provisions of the Listing Agreement, as defined in Section A10 of the manual, were expressly promulgated for the benefit of the investing public, the plaintiffs were intended to directly benefit from those provisions and are third party beneficiaries of the Listing Agreement. As third party beneficiaries, the plaintiffs have a contractual cause of action against Boeing for its breach of the Listing Agreement. Lawrence v. Fox, 20 N.Y. 268 (1859); Seaver v. Ransom, 224 N.Y. 233 (1918); Cappello v. Union Carbide, 200 Misc. 924, affirmed 277 A.D. 1017, motion to reargue denied 277 A.D. 1161 (1951); Salmo v. Rosenberg, 31 Misc. 2d 911 (1961); Weinberg v. New York Stock Exchange, (supra.); United States Ex Rel Johnson v. Mosley Construction Co., 98 F. 2d 781, 788-89 (2d Cir. 1938); Lemon v. Bossier Parish School Board, 240 F. Supp. 709, 713 (W.D. La. 1965), affirmed 370 F. 2d 847 (5th Cir. 1967).

The doctrine that an agreement may be enforced by a person not a party to it, if the benefit of the agreement was intended for such person, was clearly established in the landmark case of Lawrence v. Fox (supra). It was expanded in the Seaver case to cover third parties to whom no pecuniary obligation was owed. The Court stated:

" The doctrine of Lawrence v. Fox is progressive, not retrograde. The course of the late decision is to enlarge not to limit the effect of that case. The Court in that leading case attempted to adopt the general doctrine that any third person, for whose direct benefit a contract was intended could sue on it" (224 N.Y. at 240) (emphasis added).

In the Cappello case, the Court recognized that a diverse group such as the plaintiffs herein could be third party beneficiaries when it stated:

" In actions by a third party beneficiary, it is unnecessary that he be identified specifically when the contract is made (citations) or that he be aware of the contract when made (citations) or even that he be in the position of a creditor when the contract was entered into." (200 Misc. at 930).

Clearly, the agreement made by Boeing with the Exchange to publicize the redemption notice was made for the benefit of the Debenture holders. Thus, as stated in the Seaver case, that promise may be enforced by the plaintiffs as third party beneficiaries.

The facts here are substantially analogous to the classes of cases involving agreements between contractors and municipalities containing promises for the benefit of the individuals in the municipalities. An example is the Salmo case where the Court stated that "citizens have been permitted to enforce promises to municipal and quasi-municipal corporations for the benefit of their inhabitants." In both the municipal cases and this case the promisee seeks to benefit a large group of individuals who are within its sphere of protection.

Recently, Judge Gurfein held in the Weinberger case (supra) that an individual plaintiff was a third party beneficiary of an agreement between the Exchange and the SEC and that the breach of the agreement gave plaintiff an independent claim for relief. Boeing's Listing Agreement with the Exchange is of the same character as the agreement in the Weinberger case and its breach by Boeing gives right to the claims of the plaintiffs herein.

In the Weinberger case, Judge Gurfein stated, in footnote 10 to his opinion:

"A further argument supporting the imposition of liability is that there would be no reason to require an agreement of the exchanges if members of the public could not claim thereunder, since under no circumstances could the Government suffer damages recoverable under that agreement."

The same reasoning is applicable to the instant case because the Exchange did not suffer damages, only the third party beneficiary Debenture holders did.

POINT III

BOEING MAY NOT RELY ON THE MINIMAL PUBLICATION REQUIREMENTS OF THE INDENTURE, SINCE THE INDENTURE IS A CONTRACT OF ADHESION

The contract governing the Debentures was the Indenture safely locked in the vaults of the Chase Manhattan Bank, the Indenture Trustee. Its terms were not negotiated by the buyers of the Indenture and it would be unusual if a single one of the Debenture holders read the 112 page Indenture either before

or after the purchase. The Indenture contract is a classic case of "contract by adhesion."

We agree with the definition of a "contract of adhesion" stated by the Court below, i.e., a contract of adhesion "is a contract drawn by one of the contracting parties in which the other party has no choice but to accept or reject (4 Williston on contracts, 3rd Ed. 1961, 1971 Supp.: Shay v. Agricultural Committee, 299 F. 2d 516): and where the Court will ascertain the meaning of the contract which the weaker party would reasonably expect (Gray v. Zurich Insurance Co., 54 Cal. 2d 104, 419 P. 2d 168) " (A299a).

Commentators have noted that "The contract between the issuer and the holder of a convertible security is an adhesion contract." Convertible securities: Holder Who Fails to Convert Before Expiration of the Conversion Period, 54 Cornell Law Review 271 (1969), p. 272. The article continues to state, at pp. 278-279:

"The usual procedure for notifying holders of an impending redemption is publication of a notice once a week for four weeks in a New York City newspaper . . .

". . . these procedures entail a high probability that a holder will not be notified. For this reason, the procedures should be deemed unconscionable."

The United States District Court for the Northern District of New York has recently recognized that a contract is not binding if it is a contract of adhesion. In Bond v. Dentzer, 362 F. Supp. 1373, 1383 (N.D.N.Y. 1973), the Court excused a defendant from terms of a wage assignment agreement upon the

grounds that the agreement was a contract of adhesion.

The Court below contends that the Indenture was not a contract of adhesion because it was not "such minimal notice as to constitute 'ritualistic notice in small print on the back pages of a newspaper'", and that the notice was adequate. (A300a). Not only was the notice "ritualistic", but it was not notice at all. Eisen v. Carlisle & Jacquelin, 42 L.W. 4804 decided just this May by the Supreme Court stressed the "inadequacies of published notice" and cited Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950) as holding that "publication notice could not satisfy due process where the names and addresses of the beneficiaries were known."

In the instant action, "the names and addresses of the beneficiaries were known" because the Debentures were offered pursuant to a subscription offering to Boeing's shareholders and the subscriptions to the offering would show the subscribers to it. A simple letter to such subscribers would have reached those still holding the Debentures. A letter to Boeing's shareholders would have had a similar effect. Boeing also could have ascertained the names and addresses of the unregistered Debenture holders who presented their coupons for the collection of interest annually to the Bank.

Boeing did not even attempt any of these procedures and, therefore, 7 1/2% of the Debenture holders, holding an aggregate amount of \$1,544,300 in face amount, did not receive notice.

The fact that the notice given and the notice prescribed by the Indenture was insufficient is also recognized by the Exchange in that the Exchange required different notice, i.e., by an immediate general news release issued to New York newspapers or the wire services. In fact, Section A10 expressly stated that the notice pursuant to indentures, such as given by Boeing, is not adequate. Yet Boeing failed to comply with the standard of adequacy of notice that had been provided for them by the Exchange.

The Court below contends that Boeing could not have realistically followed all of the above described procedures for providing more adequate notice because of the diversity of the Debenture holders and that, even if it had, there would still be no assurance that actual notice would have been received by all of the Debenture holders. However, Boeing could have attempted to follow some, if not all, of such procedures, and have actually followed them to the extent possible, thereby reaching far more of the Debenture holders than they actually did. However, not only did Boeing fail to make an attempt to follow such procedures, but they failed to follow even the procedure specified by the Exchange as reasonably calculated to reach the Debenture holders, i.e., prompt publication of a general news release.

The lower Court then proceeds to state that the Debenture and Indenture gave notice to the Debenture holders of the manner in which notice of conversion might be forthcoming. How-

ever, this argument begs the issue in that, regardless of whether or not the Debenture holders were told that they would be provided with insufficient notice of the conversion, they had to accept such insufficient notice provisions because the contract was one of adhesion. Moreover, as can be seen from an examination of the specimen Debenture contained in the book of exhibits (E1) , the provisions contained in the Debenture, about the manner in which notice of conversion might be given, is in small type and buried among the many other provisions therein. Not only were the Debenture holders forced to accept the provision that they would be provided with insufficient notice of conversion, but the provision itself for such insufficient notice was contained in what is classically known as "fine print".

POINT IV

IF THIS COURT DOES NOT ORDER THAT JUDGMENT BE ENTERED FOR PLAINTIFFS, IT SHOULD ORDER A NEW TRIAL SINCE THE HOSTILITY OF THE COURT BELOW TO THE PLAINTIFFS' COUNSEL, AND A RULING THAT IT MADE WITH RESPECT TO THE CONDUCT OF THE TRIAL, PRECLUDED THE PLAINTIFFS FROM HAVING A FAIR TRIAL

At the outset, it should be understood that the Court below displayed shocking hostility toward one of the plaintiffs' attorneys, Norman Winer, Esq., during the trial. The most blatant manifestations of this hostility are pointed out below.

Upon a criticism by the Court of the manner in which the plaintiffs prepared their case, Mr. Winer stated that much time had been put into such preparation. The Court then criticized Mr. Winer for interrupting, whereupon Mr. Winer apologized. The Court responded by stating:

"I don't like your attitude, and I don't like your position with your hands on your hips. That is not the right way for a lawyer to stand and address the Court. Now, I am not in a belligerent mood; you probably are" (A493a).

The lower Court's hostility towards Mr. Winer was again expressed when, after repeatedly interrupting Mr. Winer's direct examination of his expert witness, the lower Court commented upon Mr. Winer's objection to such interruption as follows:

"You are insulting and impertinent. You have opened your mouth when you shouln't have, and when you do so, you do it impertinently." (A601a).

Mr. Winer responded to this abusive tirade in a professional and gentlemanly manner by stating:

"I don't think so. I don't mean to be impertinent." (A601a).

Perhaps such abuse by the lower Court might have been tolerable if it had permitted plaintiffs' counsel to examine the witnesses in a logical manner. However, by a purely arbitrary and capricious ruling on the conduct of the examination of witness-

es, the trial Court turned the plaintiffs' examination into a farce.

The lower Court had appointed a committee of three as counsel for the plaintiffs, and Mr. Winer and Stuart Wechsler, Esq., of that committee, were the most active participants in the prosecution of the case. The work was divided between them and, accordingly, Mr. Wechsler was solely responsible for the preparation of the portion of the case pertaining to Boeing's violation of Section A10 and of the Listing Agreement, and Mr. Winer was solely responsible for the portion of the case pertaining to the conversion ratio.

At the outset of the trial, it became clear that certain witnesses would have to be questioned on both aspects of the case, i.e., upon Boeing's violation of the Exchange rule and upon the conversion ratio, and that only Mr. Wechsler was appropriately prepared to ask questions pertaining to the former while only Mr. Winer was prepared to ask questions pertaining to the latter. Notwithstanding the fact that the lower Court was fully familiar with the manner in which the plaintiffs' committee had divided the work, and that the problem was again reiterated to the Court during the trial, the lower Court refused to permit more than one counsel from each side to examine a witness. (A316a-319a; A464a-471a). Thus, when a witness had to be questioned upon both of the above mentioned aspects of the prosecution, either Mr. Wechsler or Mr. Winer had to conduct the entire examination although neither was familiar with both aspects.

As a result of the foregoing, Mr. Wechsler was forced to reiterate questions to witnesses as they were being whispered into his ear by Mr. Winer, or to ask questions of witnesses which had previously been given to him in writing by Mr. Winer. This procedure was followed throughout large portions of the trial. (A471a-479a; A481a-486a; A488-490a; A556a-577a.)

Because the trial was forced to proceed in this manner, numerous problems arose. For example, at one point when Mr. Wechsler was acting as Mr. Winer's mouthpiece, the Court directed a question to plaintiffs' counsel that only Mr. Winer knew the answer to since the questions were really originated by him. Thus, Mr. Winer asked, "Are you addressing me?". The Court, insisting upon the charade that Mr. Wechsler was asking the questions, stated "No. The examiner (meaning Mr. Wechsler). Haven't we gone over this before?" Mr. Wechsler, of course, could not answer the question until he consulted with his co-counsel. After such consultation, Mr. Wechsler was finally able to respond to the Court's question by stating: "No.". (A475a).

After forcing the plaintiffs' counsel to examine witnesses in this awkward manner, requiring them to hold numerous conferences during the course of the trial to enable them to proceed in spite of the obstruction placed in the way by the Court's ruling, the Court then proceeded to needle plaintiffs' counsel for having such conferences. Thus, during one such con-

versation, the Court stated "This conference, gentlemen, should have taken place before the Court session began. You are imposing on the Court with these unnecessary delays. Next question". (A576a).

The procedure insisted upon by the lower Court became so confused and intolerable that, during the eliciting of testimony with the procedure fashioned by the Court, the Court itself admitted it was confused. The Court said:

"I want it propounded anew, because at this point we are all confused, at least I am." (A568a).

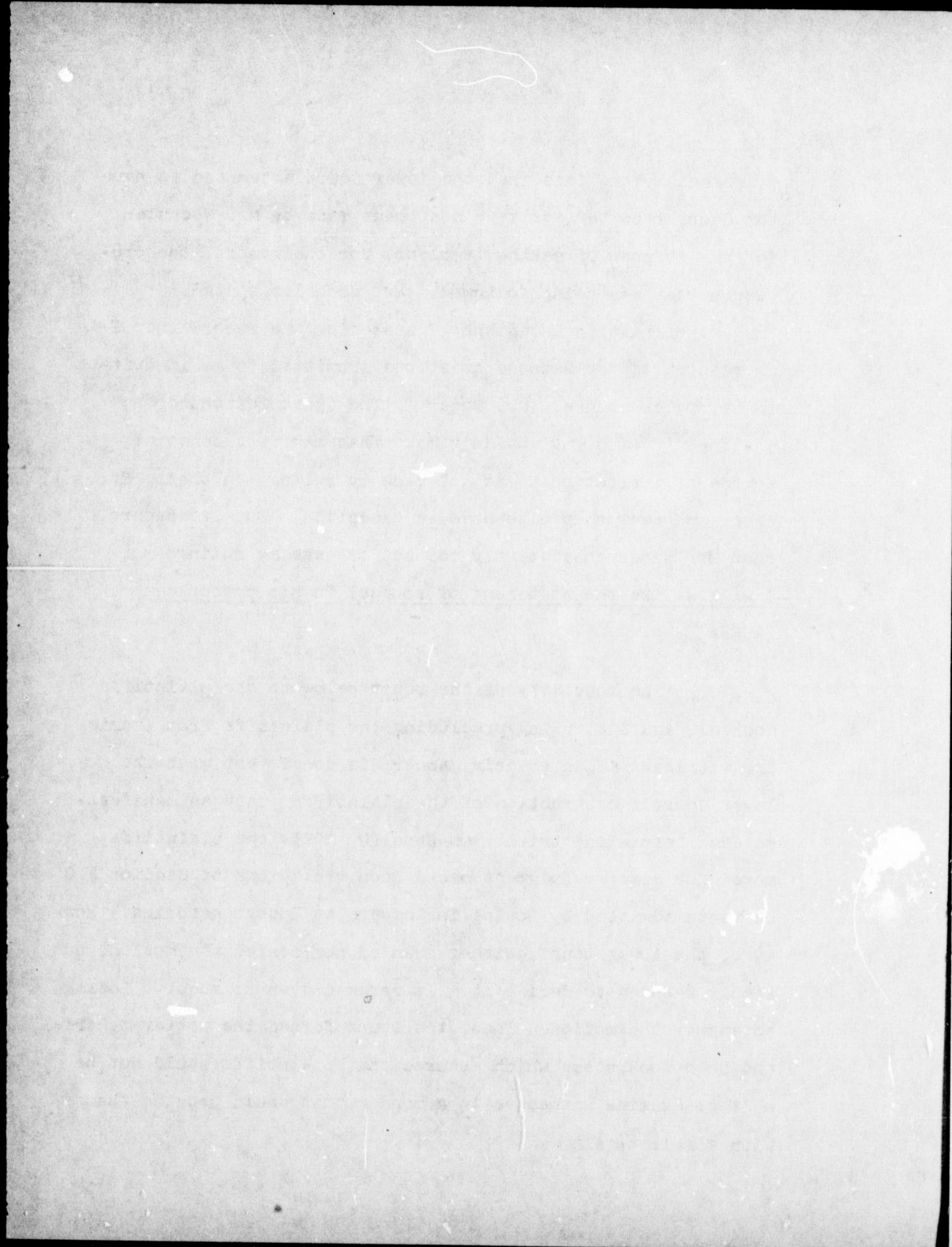
In view of the fact that the Court was sitting as both Judge and Jury, it is very disconcerting that the Court forced the plaintiffs to put in their case in a manner which even confused the Court.

) The plaintiffs' counsel protested on numerous occasions against the lower Court's capricious ruling that one attorney would have to act as the mouthpiece for another. Mr. Winer, at one point, stated "I think I should state that I find it impossible to conduct the examination under these circumstances." (A480a). The lower Court, however, flippantly brushed aside Mr. Winer's plea for a reasonable trial by responding "I don't see that it is impossible, a lawyer as bright as you, who worked in the case preparing it for six years." (A480a).

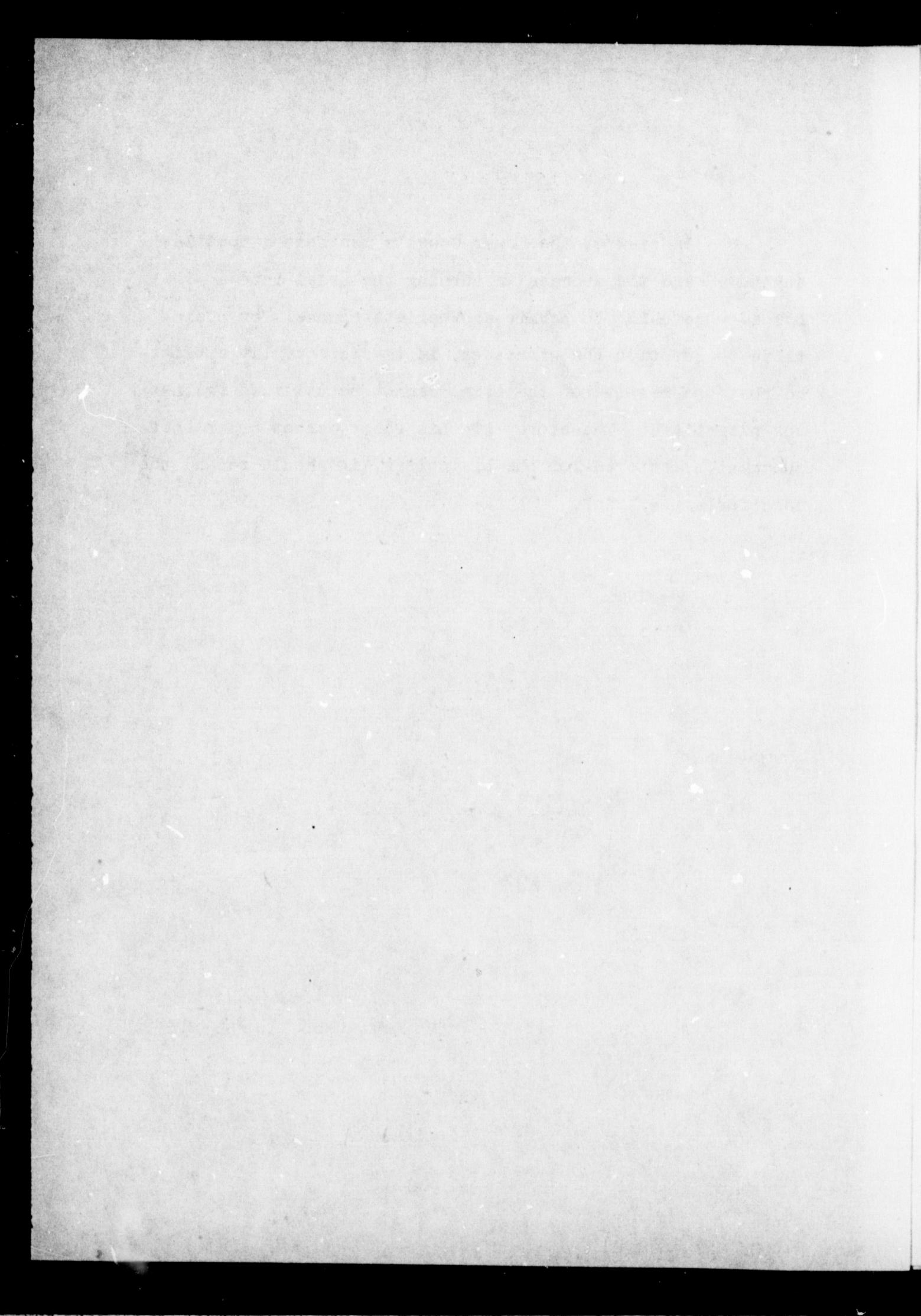
Apparently, even the lower Court must have realized that the procedure it was insisting upon was untenable. This is

evidenced by the fact that the lower Court attempted to have the Court reporter strike a statement made by Mr. Wechsler for the purpose of making it clear, for the record, the procedure that was being followed. Mr. Wechsler stated, "Mr. Winer has requested that I state for the record that I am reading to the witness questions submitted to me in writing by my co-counsel, Mr. Winer." The Court responded, by stating, "I wish you wouldn't make that matter a constant source of irritation to me. I made my rulings on that. Mr. Winer and everybody else have an exception. But it appears that Mr. Winer consistently refuses to take my rulings. . . . I will strike the statement of counsel in his preamble. . . ." (A556a).

The hostility of the Court below to the plaintiffs' counsel, and its ruling precluding the plaintiffs from examining witnesses in an orderly manner, is consistent with the lower Court's obstruction of the plaintiffs' case as manifested even before the trial. On June 29, 1971, the plaintiffs moved for summary judgment based upon violations of Section A10 on facts admitted by Boeing in Answers to Interrogatories. However, the lower Court neither granted nor denied the motion, but simply refused to decide it. It refused even to require Boeing to answer the motion. Thus, the Court forced the matter to trial and then took steps which assured that plaintiffs would not be able to examine witnesses in a manner that would provide them with a fair trial.



In view of the lower Court's manifested hostile attitude, and its success in turning the trial into a farce by refusing to permit appropriate counsel for plaintiffs to question the witnesses, it is respectfully submitted that the results of the trial cannot be utilized against the plaintiffs. Therefore, if this Court cannot order that judgment be entered for the plaintiffs, it should remand the case for a new trial.



CONCLUSION

The lower court erred in dismissing the complaint. Therefore, it is respectfully requested that this court order that judgment be entered against the defendant in the amount of \$4,026,762.25, with interest from March 29, 1966, together with the costs and disbursements of this action. If the court is unable to order that judgment be entered against the defendant, then it is respectfully requested that the matter be remanded for the resolution of any issues or for a new trial.

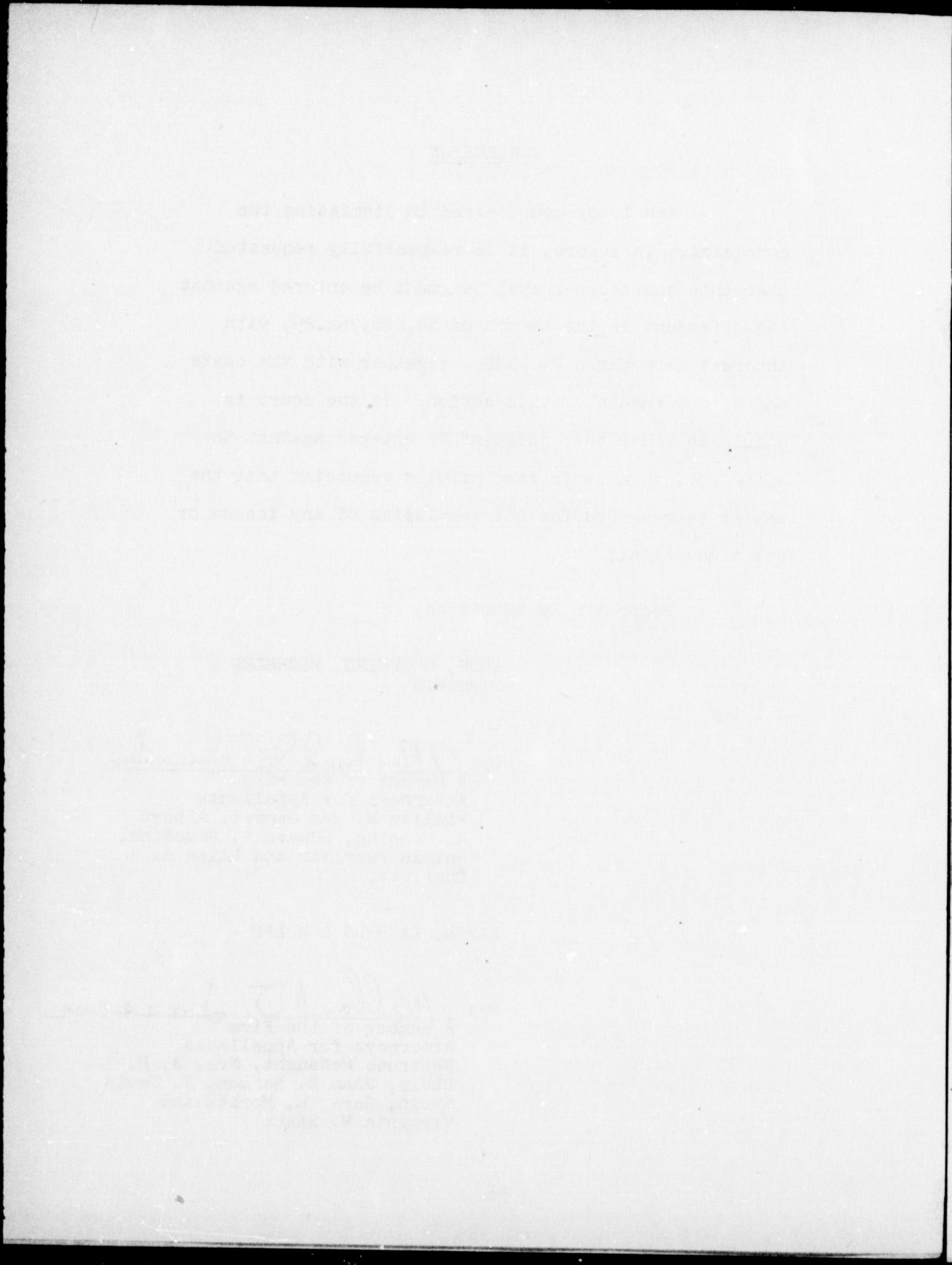
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ADDENDUM TO BRIEF

EXHIBIT 43 - SECTION A10

SECTION A 10

REDEMPTION ON--TENDER OFFERS

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/U
SECTION A 10

REDEMPTION

**Publicity, and Notice to Exchange, Required
as to Redemption Action**

The company's listing agreement with the Exchange requires immediate publicity and immediate notice to the Exchange in respect of any corporate action (or of any other action of which the company has knowledge) which will result in, or which looks toward, the redemption of a listed security either as a whole, or in part.

Publicity: The term "publicity," as used in the foregoing paragraph and below, and as used in the listing agreement in respect of redemption action, refers to a general news release, and not to the formal notice or advertisement of redemption sometimes required by provisions of an indenture or charter.

Such news release shall be made as soon as possible after corporate action which will lead to, or which looks toward, redemption is taken, or as soon as possible after the company acquires knowledge of any such action taken by others, and shall be made by the fastest available means, i.e., telephone, telegraph or hand-delivery.

To insure coverage which will adequately inform the public, the news should be released to at least one or more newspapers of general circulation in New York City which regularly publish financial news, or to one or more of the national news-wire services (Associated Press, United Press International), in addition to such other release as the company may elect to make. Release should also be made simultaneously to the news-ticker service operated by Dow Jones & Company, Inc., which has agencies in various cities, and whose New York City address is 44 Broad Street.

There shall be no restriction as to the day or hour of publication by any of the agencies to which the news is released.

Emphasis is placed upon the necessity of promptness in releasing news regarding redemption because of its possible effect upon the market price of the security, and because of its general significance to holders of the security.

Notice to Exchange: In addition to immediate release of news regarding redemption to the public press, the company is required to give the Exchange notice in respect of such redemption as soon as possible after corporate action

is taken, or as soon as possible after the company acquires knowledge of such action. Such notice shall be received by the Exchange at least fifteen days in advance of the redemption date.

If the entire outstanding amount of the class, issue, or series is being redeemed, such notice shall be given immediately, by hand-delivery if feasible, or if that is not feasible, it shall be given by telephone or telegraph and confirmed promptly in writing. Notice by the fastest available means is essential as, in the case of a total redemption, the Exchange must give the promptest possible notice of the redemption over its ticker system as a precaution against people dealing in the security without knowledge of the impending redemption. It is also necessary to issue a ruling as to the basis of further dealings in the security, attach a special designation to its ticker symbol, and take other steps for continuance of an orderly market in the security.

While taking note of news items and advertisements in the public press in respect of redemption actions, the Exchange cannot accept them as sufficiently authoritative for its purposes, and must require that notice of such action be given it by direct communication. Such communication should be addressed to the Department of Stock List of the Exchange.

Record Date—Closing of Transfer Books—Advance Notice: The company's agreement with the Exchange also requires that the Exchange receive prompt notice of action taken to fix a record date for holders of a listed stock, or to close the transfer books, for any purpose.

This requirement applies, among other cases, to any record of stockholders, or closing of transfer books for the purpose of drawing certificate numbers to be redeemed, or for any other purpose in connection with a redemption.

Reference is made to the fuller discussion of the requirement for prompt notice in Section A9 of this Manual, entitled *Record Date—Closing of Transfer Books*.

Place of Redemption: The company's listing agreement with the Exchange requires the maintenance of an agency in the Borough of Manhattan, City of New York, where securities called for redemption may be presented for payment.

If funds for redemption are deposited in a bank located in a city other than New York and the letter of transmittal provides for the redemption at such bank, arrangements also should be made for the acceptance of called securities and payment of the redemption price at an agency in New York City, which may be the New York correspondent of such bank.

**Redemption of Entire Class, Issue, or Series—
Stock or Bonds**

In event of an action to redeem, or looking toward redemption of, an entire class, issue, or series of a listed security, the procedure described below shall be followed by the company with respect to Exchange requirements.

1. Give immediate newspaper publicity to the action, indicating in such publicity the redemption date, redemption price, and the dollar amount of dividends or interest to be paid upon redemption. If provision is to be made for payment of redemption funds to holders of the redeemed security prior to the redemption date, state when such funds will be available to holders. If the security to be redeemed is convertible, indicate the rate of conversion and the date and time when the conversion privilege will finally expire. If, prior to the date when the conversion period will finally expire, there will be a period during which conversions cannot be effected, indicate the dates beginning and ending that period. If any dividend declared (or accrued) on or before the date of the redemption action, on the class of security issuable upon conversion of the securities to be redeemed remains unpaid, indicate whether or not shares issued upon conversion of the securities to be redeemed will be entitled to receive such dividend.

[] As to any of such data not known or determined at the time publicity is given initially, similar publicity shall be given immediately it becomes known or determined.

2. Give immediate notice of the redemption action to the Exchange, including all details specified in paragraph 1 above, and, in addition, the name and address of the redemption or paying agent. This notice shall be in writing and delivered by hand to the Department of Stock List of the Exchange, if feasible. If immediate hand-delivery of written notice is not feasible, notice of the redemption action shall be given that Department immediately by telephone or telegraph and confirmed promptly, in writing. As previously stated, notice of the redemption action shall be received by the Exchange at least fifteen days in advance of the redemption date.

[] As to any such data not known or determined at the time notice is given the Exchange initially, similar notice shall be given immediately it becomes known or determined.

3. As soon as available, file with the Exchange certified copies of any resolutions of the Board of Directors of the company in respect of the redemption.

4. Instruct the redemption or paying agent to notify the Exchange promptly of the deposit of funds for payment of the redeemed securities.
5. File with the Exchange two copies of any notice or other material sent to security holders, with regard to the redemption.

Partial Redemption—Stock

If the action will result in, or looks toward, the redemption of only part of a listed class or series of stock, the procedure described below shall be followed by the company.

1. Give immediate newspaper publicity to the action, indicating the number (or maximum number) of shares to be redeemed, the redemption date, the redemption price, and the dollar amount of any dividend to be paid on the redeemed shares upon redemption. If provision is to be made for payment of the redemption funds to holders of the redeemed shares prior to the redemption date, indicate when such funds will be available to holders. If the shares to be redeemed are convertible, indicate the conversion rate and the date and time when the conversion privilege will finally expire. If, prior to the date on which the conversion privilege will finally expire, there will be a period during which conversions cannot be effected, indicate the dates beginning and ending that period. If any dividend declared (or accrued) on or before the date of the redemption action on the class of security issuable upon conversion of the securities to be redeemed remains unpaid, indicate whether or not the shares issued upon conversion of the securities to be redeemed will be entitled to receive such dividend. If a record date is to be employed for determination of the shares to be redeemed, or if the transfer books are to be closed for that purpose, state the date of record, or dates of closing and reopening of the books.

As to any of such data not known or determined at the time such publicity is given initially, similar publicity shall be given immediately it becomes known or determined.

2. Give the Exchange immediate notice of the redemption action, including all details specified in paragraph (1.) above, and, in addition, the name and address of redemption or paying agent. State the method by which the shares to be redeemed will be determined (whether pro rata, by lot, etc.). State also whether the transfer books will be closed permanently with respect to shares to be redeemed and when such closing will take place, or whether stamped certificates will be issued upon transfer of shares to be redeemed.

As to any such data not known or determined at the time notice is given initially, notice shall be given immediately it becomes known or determined.

Notice shall be in writing and delivered by hand to the Department of Stock List of the Exchange, if practicable. As previously stated, notice of the redemption action shall be received by the Exchange at least fifteen days prior to the redemption date. Particular attention is called to the fact that the Exchange must receive at least ten days' advance notice of any date for the taking of a record of stockholders or closing of the transfer books.

3. As soon as available, file certified copies of any resolutions of the Board of Directors of the company, in respect of the redemption, with the Exchange.
4. Instruct the redemption or paying agent to notify the Exchange promptly of the deposit of funds for payment of the redeemed securities.
5. File two copies of any notice or other material sent to stockholders, with regard to the redemption, with the Exchange.

Notice of Redeemed Certificate Numbers: If shares to be redeemed are to be determined by drawing of certificates, the Exchange asks that it be furnished, as promptly as possible after the drawing, with 1000 printed copies of a notice, prepared by the company or its agent, stating all significant facts in respect of the redemption, and listing the numbers of certificates drawn for redemption, and the number of shares to be redeemed in respect of each certificate (if the whole certificate is not being redeemed). Said copies should be delivered to the Exchange by hand, if feasible, to save all time possible.

These copies are for distribution by the Exchange to member firms. This procedure is essential, because certificates drawn for redemption cease to be deliverable, after the record date employed for the drawing, in settlement of contracts made in the regular way on the Exchange. As there is no way of ascertaining which certificates are in that status until such a notice is available, and some certificates drawn for redemption will, in the meanwhile, probably be delivered in settlement of contracts and require adjustment, the utmost speed in the drawing of certificates and distribution of the notice is essential. If a notice including the numbers of drawn certificates is prepared by the company or redemption agent for the purpose of formal advertisement, or distribution to stockholders, 1000 reprints thereof will be acceptable for the Exchange's purpose.

Partial Redemption—Bonds

If the action will result in the redemption of only a part of a listed issue or series of bonds, the procedure described below shall be followed by the company.

1. Give immediate newspaper publicity to the action, indicating the principal amount of bonds to be redeemed, the redemption date, the redemption price, and the dollar amount of interest which will be paid on the redeemed securities upon redemption. If provision is to be made for payment of the redemption funds to holders of the redeemed securities prior to the date of redemption, indicate when such funds will be made available to holders. If the bonds to be redeemed are convertible, indicate the conversion rate, and the date and time when the conversion privilege will finally expire. If, prior to the date on which the conversion privilege will finally expire, there will be a period during which conversions cannot be effected, indicate the dates beginning and ending that period. If any dividend declared, on or before the date of the redemption action, on the class of security issuable upon conversion of the securities to be redeemed remains unpaid, indicate whether or not shares issued upon conversion of the securities to be redeemed will be entitled to receive such dividend.

As to any such data not known or determined at the time publicity is given initially, similar publicity shall be given immediately it becomes known or determined.

2. Give the Exchange immediate notice of the redemption action, including all details specified in paragraph (1.) above, and, in addition, the name and address of the redemption or paying agent. As to any such data not known at the time notice is given the Exchange initially, similar notice shall be given immediately it becomes known or determined. As previously stated, notice of the redemption action shall be received by the Exchange at least fifteen days prior to the redemption date.
3. As soon as available, file with the Exchange certified copies of any resolutions of the Board of Directors of the company in respect of the redemption.
4. Instruct the redemption or paying agent to notify the Exchange promptly of the deposit of funds for payment of the redeemed securities.
5. File two copies of any notice or other material sent to bondholders, with regard to the redemption, with the Exchange.

Dealings on Exchange in Securities Called for Redemption

Entire Class, Issue or Series Called: When an entire class, issue or series of a listed security is to be redeemed, dealings in such security on the Exchange are suspended as soon as the redemption funds become available to holders of the security, unless such security is convertible and its market price is at, or close to, the conversion price. In the latter case, suspension of the security from dealings may be deferred until the opening of business on the day on which the right of conversion expires, or until conversion ceases to be active, or until the amount of the security outstanding has been so reduced as to make continued dealings inadvisable in the opinion of the Exchange.

Part of Class, Issue or Series Called: When only part of a listed class, issue or series is to be redeemed, the amount thereof authorized to be listed is reduced by the number of shares, or face amount of bonds, to be so redeemed as soon as the redemption funds become available to holders of the redeemed security, unless the class, issue or series is convertible, in which case the reduction in the amount authorized to be listed is deferred until conversions occur, or until expiration of the right of conversion.

However, under the rules of the Exchange, certificates of stock or registered bonds called for redemption are not deliverable, in settlement of contracts, after the record date (or closing of the transfer books) for determination of the certificates or registered bonds to be redeemed, except in respect of transactions in called securities dealt in specifically as such. Coupon bonds are not deliverable in settlement of contracts on and after the date of first publication of notice of the call for redemption (containing the numbers of called bonds) except in respect of transactions in the called bonds dealt in specifically as such.

If the amount called for redemption is substantial, or if such amount represents a substantial proportion of the total outstanding amount of the class, issue or series, and, if the transfer books for the called portion of the security are not to be permanently closed until the date of redemption, the Exchange will admit such called portion to dealings on the Exchange as a separate issue, designated as a called security, if it considers such action to be in the public interest. Where this is done, such dealings continue until the date of redemption or, in the case of a convertible security, until the expiration of the right of conversion if that be earlier than the date of redemption.

No application, or other action by the company, is required in connection with such admission of the called portion of the security to dealings, in respect of either the Exchange, or the Securities Exchange Act of 1934.

Paragraphs of Listing Agreement Relative to Redemption

The paragraphs of the listing agreement relative to redemption are Paragraphs 9, 10 and 11 of Section I and Paragraphs 1(a), 1(b) and 4 of Section III of the current form of listing agreement, and read as follows:

I

9. The Corporation will not select any of its securities listed on the Exchange for redemption otherwise than by lot or pro rata, and will not set a redemption date earlier than fifteen days after the date corporate action is taken to authorize the redemption.
10. The Corporation will promptly notify the Exchange of any corporate action which will result in the redemption, cancellation or retirement, in whole or in part, of any of its securities listed on the Exchange, and will notify the Exchange as soon as the Corporation has notice of any other action which will result in any such redemption, cancellation or retirement.
11. The Corporation will promptly notify the Exchange of action taken to fix a stockholders' record date, or to close the transfer books, for any purpose, and will take such action at such time as will permit giving the Exchange at least ten days' notice in advance of such record date or closing of the books.

III

1. The Corporation will maintain in the Borough of Manhattan, City of New York, in accordance with the requirements of the Exchange:
 - a. An office or agency where the principal of and interest on all bonds of the Corporation listed on the Exchange shall be payable and where any such bonds which are registerable as to principal or interest may be registered; and
 - b. An office or agency where:
 - (1) All stock of the Corporation listed on the Exchange shall be transferable.
 - (2) Checks for dividends and other payments with respect to stock listed on the Exchange may be presented for immediate payment.
 - (3) Scrip issued to holders of a security listed on the Exchange and representing a fractional interest in a security listed on the Exchange will, during the period provided for consolidation thereof, be accepted for such purpose.

(4) A security listed on the Exchange which is convertible will be accepted for conversion.

If at any time the transfer office or agency for a security listed on the Exchange shall be located north of Chambers Street, the Corporation will arrange, at its own cost and expense, that its registrar's office, or some other suitable office satisfactory to the Exchange and south of Chambers Street, will receive and redeliver all securities there tendered for the purpose of transfer.

If the transfer books for a security of the Corporation listed on the Exchange should be closed permanently, the Corporation will continue to split up certificates for such security into certificates of smaller denominations in the same name so long as such security continues to be dealt in on the Exchange.

If checks for dividends or other payments with respect to stock listed on the Exchange are drawn on a bank located outside the City of New York, the Corporation will also make arrangements for payment of such checks at a bank, trust company or other agency located in the Borough of Manhattan, City of New York.

4. The Corporation will publish immediately to the holders of any of its securities listed on the Exchange any action taken by the Corporation with respect to dividends or to the allotment of rights to subscribe or to any rights or benefits pertaining to the ownership of its securities listed on the Exchange; and will give prompt notice to the Exchange of any such action; and will afford the holders of its securities listed on the Exchange a proper period within which to record their interests and to exercise their rights; and will issue all such rights or benefits in form approved by the Exchange and will make the same transferable, exercisable, payable and deliverable in the Borough of Manhattan in the City of New York.

Applicable Rule of the Securities and Exchange Commission

Rule 12d2-2. Removal From Listing and Registration of Matured, Redeemed, or Retired Securities.

(a) Within a reasonable time after a national securities exchange knows or is reliably informed that any of the following conditions exist with respect to a security listed and registered thereon, the exchange shall file with the Commission a notification on Form 25 of its intention to remove such security from listing and registration:

(1) The entire class of the security has been called for redemption, maturity or retirement; appropriate notice thereof has been given; funds sufficient for the payment of all such securities have been

- deposited with an agency authorized to make such payments; and such funds have been made available to security holders.
- (2) The entire class of the security has been redeemed or paid at maturity or retirement.
 - (3) The instruments representing the securities comprising the entire class have come to evidence, by operation of law or otherwise, other securities in substitution therefor and represent no other right, except, if such be the fact, the right to receive an immediate cash payment (the right of dissenters to receive the appraised or fair value of their holdings shall not prevent the application of this provision).
 - (4) All rights pertaining to the entire class of the security have been extinguished: *Provided*, That where such an event occurs as the result of an order of a court or other governmental authority, the order shall be final, all applicable appeal periods shall have expired, and no appeals shall be pending.

Effective Date of Removal: If the conditions of this rule are complied with, removal of a security from listing and registration pursuant to a notification on Form 25 shall become effective at the opening of business on such date as the exchange shall specify in said Form: *Provided, however, That such date shall be not less than seven days following the date on which said Form is mailed to the Commission for filing: And provided further, That in the event removal is being effected under paragraph (a) (3) of this rule and the exchange has admitted or intends to admit a successor security to trading under the temporary exemption provided for by Rule 12a-5, such date shall not be earlier than the date on which the successor security is removed from its exempt status.*

TENDER OFFERS

The Exchange believes it is important that all stockholders of a company be given an opportunity to participate on equal terms in any offer made which may affect the rights or benefits of such stockholders.

This objective has been implemented by the company's listing agreement with the Exchange. As an example, a company agrees that it will not select any of its securities listed on the Exchange for redemption otherwise than pro rata or by lot.

The same considerations apply when a company invites its stockholders or stockholders of another company to tender their share for purchase, even though such tender offers are not covered by a listing agreement. It is important, therefore, that all stockholders be given an equal opportunity to participate in such offers.

While it is desirable that a period of about 30 days be used, a tender offer should remain open for a minimum of 10 days, so that all stockholders, even though they may live at a distance, will have ample opportunity to learn of the tender offer and to tender their shares. Where the minimum period is used, notices should be sent by air mail to distant stockholders and provision made for telegraphic acceptance through a member firm or bank, similar to a rights offering.

If only a specified number of shares are to be purchased, the offer should provide that tenders will be accepted on a pro rata basis if more shares are tendered than are to be purchased. An offer on any basis such as a "first-come first-served" basis is normally objectionable, as stockholders resident near the place of tender may immediately supply all the stock that is to be purchased, with the result that stockholders living at a distance would have no opportunity to take advantage of the tender offer. After a minimum period of 10 days for the acceptance of shares on a pro rata basis, there is no objection to receiving shares thereafter on a "first-come first-served" basis.

Normally a tender offer is not limited to stockholders of record on any given date. The reason for this is that some holders may not be holders of record on a given date, either because of the use of their stock for lending purposes or due to the fact that stock had not been transferred to their names. Under such circumstances, stockholders who wish to accept an offer would be deprived of their right to do so. However, if a record date is essential to a company's program, it should not be earlier than 10 days after announcement of the tender offer, in order to give all stockholders an opportunity to transfer and thereby to protect their interests.

Where it is thought unusual and exceptional circumstances may be present in a particular case, they should be discussed with the Exchange before an offer is made with terms at variance with the principles of this statement.

[The next page is A-183]

EXHIBIT 8 - NEW YORK STOCK EXCHANGE LISTING AGREEMENT

NEW YORK STOCK EXCHANGE

LISTING AGREEMENT

Nothing in the following Agreement shall be so construed as to require the Issuer to do any acts in contravention of law or in violation of any rule or regulation of any public authority exercising jurisdiction over the Issuer.

EDGERS AIRPLANE COMPANY (hereinafter called the "Corporation"), in consideration of the listing of the securities covered by this application, hereby agrees with the New York Stock Exchange (hereinafter called the "Exchange"), as follows:

I

1. The Corporation will promptly notify the Exchange of any change in the general character or nature of its business.
2. The Corporation will promptly notify the Exchange of any changes of officers or directors.
3. The Corporation will promptly notify the Exchange in the event that it or any company controlled by it shall dispose of any property or of any stock interest in any of its subsidiary or controlled companies, if such disposal will materially affect the financial position of the Corporation or the nature or extent of its operations.
4. The Corporation will promptly notify the Exchange of any change in, or removal of, collateral deposited under any mortgage or trust indenture, under which securities of the Corporation listed on the Exchange have been issued.
5. The Corporation will:
 - a. File with the Exchange four copies of all material mailed by the Corporation to its stockholders with respect to any amendment or proposed amendment to its Certificate of Incorporation.
 - b. File with the Exchange a copy of any amendment to its Certificate of Incorporation, or resolution of Directors in the nature of an amendment, certified by the Secretary of the state of incorporation, as soon as such amendment or resolution shall have been filed in the appropriate state office.
 - c. File with the Exchange a copy of any amendment to its By-Laws, certified by a duly authorized officer of the Corporation, as soon as such amendment shall have become effective.
6. The Corporation will disclose in its annual report to shareholders, for the year covered by the report, (1) the number of shares of its stock issuable under outstanding options at the beginning of the year; separate totals of changes in the number of shares of its stock under option resulting from issuance, exercise, expiration or cancellation of options; and the number of shares issuable under outstanding options at the close of the year, (2) the number of unoptioned shares available at the beginning and at the close of the year for the granting of options under an option plan, and (3) any changes in the exercise price of outstanding options, through cancellation and reissuance or otherwise, except price changes resulting from the normal operation of anti-dilution provisions of the options.
7. The Corporation will report to the Exchange, within ten days after the close of a fiscal quarter, in the event any previously issued shares of any stock of the Corporation listed on the Exchange have been required or disposed of, directly or indirectly, for the account of the Corporation during such fiscal quarter, such report showing separate totals for acquisitions and dispositions and the number of shares of such stock so held by it at the end of such quarter.
8. The Corporation will promptly notify the Exchange of all facts relating to the purchase, direct or indirect, of any of its securities listed on the Exchange at a price in excess of the market price of such security prevailing on the Exchange at the time of such purchase.

9. The Corporation will not select any of its securities listed on the Exchange for redemption otherwise than by lot or pro rata, and will not set a redemption date earlier than fifteen days after the date corporate action is taken to authorize the redemption.

10. The Corporation will promptly notify the Exchange of any corporate action which will result in the redemption, cancellation or retirement, in whole or in part, of any of its securities listed on the Exchange, and will notify the Exchange as soon as the Corporation has notice of any other action which will result in any such redemption, cancellation or retirement.

11. The Corporation will promptly notify the Exchange of action taken to fix a stockholders' record date, or to close the transfer books, for any purpose, and will take such action at such time as will permit giving the Exchange at least ten days' notice in advance of such record date or closing of the books.

12. In case the securities to be listed are in temporary form, the Corporation agrees to order permanent engraved securities within thirty days after the date of listing.

13. The Corporation will furnish to the Exchange on demand such information concerning the Corporation as the Exchange may reasonably require.

14. The Corporation will not make any change in the form or nature of any of its securities listed on the Exchange, nor in the rights or privileges of the holders thereof, without having given twenty days' prior notice to the Exchange of the proposed change, and having made application for the listing of the securities as changed if the Exchange shall so require.

15. The Corporation will make available to the Exchange, upon request, the names of member firms of the Exchange which are registered owners of stock of the Corporation listed on the Exchange if at any time the need for such stock for loaning purposes on the Exchange should develop, and in addition, if found necessary, will use its best efforts with any known large holders to make reasonable amounts of such stock available for such purposes in accordance with the rules of the Exchange.

16. The Corporation will promptly notify the Exchange of any diminution in the supply of stock available for the market occasioned by deposit of stock under voting trust agreements or other deposit agreements, if knowledge of any such actual or proposed deposits should come to the official attention of the officers or directors of the Corporation.

17. The Corporation will make application to the Exchange for the listing of additional amounts of securities listed on the Exchange sufficiently prior to the issuance thereof to permit action in due course upon such application.

II

1. The Corporation will publish at least once a year and submit to its stockholders at least fifteen days in advance of the annual meeting of such stockholders and not later than three months after the close of the last preceding fiscal year of the Corporation a balance sheet as of the end of such fiscal year, and a surplus and income statement for such fiscal year of the Corporation as a separate corporate entity and of each corporation in which it holds directly or indirectly a majority of the equity stock; or in lieu thereof, eliminating all intercompany transactions, a consolidated balance sheet of the Corporation and its subsidiaries as of the end of its last previous fiscal year, and a consolidated surplus statement and a consolidated income statement of the Corporation and its subsidiaries for such fiscal year. If any such consolidated statement shall exclude corporations a majority of whose equity stock is owned directly or indirectly by the Corporation: (a) the caption of, or a note to, such statement will show the degree of consolidation; (b) the consolidated income account will reflect, either in a footnote or otherwise, the parent company a proportion of the sum of, or difference between, current earnings or losses and the dividends of such unconsolidated subsidiaries for the period of the report; and (c) the consolidated balance sheet will reflect, either in a footnote or otherwise, the extent to which the equity of the parent company in such subsidiaries has been increased or diminished since the date of acquisition as a result of profits, losses and distributions.

Appropriate reserves, in accordance with good accounting practice, will be made against profits arising out of all transactions with unconsolidated subsidiaries in either parent company statements or consolidated statements.

Such statements will reflect the existence of any default in interest, cumulative dividend requirements, sinking fund or redemption fund requirements of the Corporation and of any controlled corporation, whether consolidated or unconsolidated.

2. All financial statements contained in annual reports of the Corporation to its stockholders will be audited by independent public accountants qualified under the laws of some state or country, and will be accompanied by a copy of the certificate made by them with respect to their audit of such statements showing the scope of such audit and the qualifications, if any, with respect thereto.

The Corporation will promptly notify the Exchange if it changes its independent public accountants regularly auditing the books and accounts of the Corporation.

3. All financial statements contained in annual reports of the Corporation to its stockholders shall be in the same form as the corresponding statements contained in the listing application in connection with which this Listing Agreement is made, and shall disclose any substantial items of unusual or non-recurrent nature.

4. The Corporation will publish quarterly statements of earnings on the basis of the same degree of consolidation as in the annual report. Such statements will disclose any substantial items of unusual or non-recurrent nature and will show either net income before and after federal income taxes or net income and the amount of federal income taxes.

5. The Corporation will not make, nor will it permit any subsidiary directly or indirectly controlled by it to make, any substantial charges against capital surplus, without notifying the Exchange. If so requested by the Exchange, the Corporation will submit such charges to stockholders for approval or ratification.

6. The Corporation will not make any substantial change, nor will it permit any subsidiary directly or indirectly controlled by it to make any substantial change, in accounting methods, in policies as to depreciation and depletion or in bases of valuation of inventories or other assets, without notifying the Exchange and disclosing the effect of any such change in its next succeeding interim and annual report to its stockholders.

III

1. The Corporation will maintain in the Borough of Manhattan, City of New York, in accordance with the requirements of the Exchange:

a. An office or agency where the principal of and interest on all bonds of the Corporation listed on the Exchange shall be payable and where any such bonds which are registerable as to principal or interest may be registered.

b. An office or agency where

(1). All stock of the Corporation listed on the Exchange shall be transferable.

(2). Checks for dividends and other payments with respect to stock listed on the Exchange may be presented for immediate payment.

(3). Scrip issued to holders of a security listed on the Exchange and representing a fractional interest in a security listed on the Exchange will, during the period provided for consolidation thereof, be accepted for such purpose.

(4). A security listed on the Exchange which is convertible will be accepted for conversion.

If at any time the transfer office or agency for a security listed on the Exchange shall be located north of Chambers Street, the Corporation will arrange, at its own cost and expense, that its registrar's office, or some other suitable office satisfactory to the Exchange and south of Chambers Street, will receive and redeliver all securities there tendered for the purpose of transfer.

If the transfer books for a security of the Corporation listed on the Exchange should be closed permanently, the Corporation will continue to split up certificates for such security into certificates of smaller denominations in the same name so long as such security continues to be dealt in on the Exchange.

If checks for dividends or other payments with respect to stock listed on the Exchange are drawn on a bank located outside the City of New York, the Corporation will also make arrangements for payment of such checks at a bank, trust company or other agency located in the Borough of Manhattan, City of New York.

c. A registrar where stock of the Corporation listed on the Exchange shall be registerable. Such registrar shall be a bank or trust company not acting as transfer agent for the same security.

2. The Corporation will not appoint a transfer agent, registrar or fiscal agent of, nor a trustee under a mortgage or other instrument relating to, any security of the Corporation listed on the Exchange without prior notice to the Exchange, and the Corporation will not appoint a registrar for its stocks listed on the Exchange unless such registrar, at the time of its appointment becoming effective, is

4 qualified with the Exchange as a registrar for securities listed on the Exchange; nor will the Corporation select an officer or director of the Corporation as a trustee under a mortgage or other instrument relating to a security of the Corporation listed on the Exchange.

3. The Corporation will have on hand at all times a sufficient supply of certificates to meet the demands for transfer. If at any time the stock certificates of the Corporation do not recite the preferences of all classes of its stock, it will furnish to its stockholders, upon request and without charge, a printed copy of preferences of all classes of such stock.

4. The Corporation will publish immediately to the holders of any of its securities listed on the Exchange any action taken by the Corporation with respect to dividends or to the allotment of rights to subscribe or to any rights or benefits pertaining to the ownership of its securities listed on the Exchange; and will give prompt notice to the Exchange of any such action; and will afford the holders of its securities listed on the Exchange a proper period within which to record their interests and to exercise their rights; and will issue all such rights or benefits in form approved by the Exchange and will make the same transferable, exercisable, payable and deliverable in the Borough of Manhattan in the City of New York.

5. The Corporation will solicit proxies for all meetings of stockholders.

6. The Corporation will issue new certificates for securities listed on the Exchange replacing lost ones forthwith upon notification of loss and receipt of proper indemnity. In the event of the issuance of any duplicate bond to replace a bond which has been alleged to be lost, stolen or destroyed and the subsequent appearance of the original bond in the hands of an innocent bondholder, either the original or the duplicate bond will be taken up and cancelled and the Corporation will deliver to such holder another bond theretofore issued and outstanding.

Date... November 5, 1957

By... Vice President-Finance

UNITED STATES COURT OF APPEALS:SECOND CIRCUIT

WILLIAM R. VAN GEMERT, et al.,
 Plaintiffs-Appellants,
 against
 THE BOEING COMPANY, et al.,
 Defendants-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Victor Ortega, being duly sworn,
 deposes and says that defendant is not a party to the action, is over 18 years of age and resides at
 1027 Avenue St. John, Bronx, New York
 That on the day of September 1974 at a*

defendant served the annexed ~~Appellants to Appellees~~, Appellants brief upon

the 2nd day of September 1974 in this action by delivering a true copy thereof to said individual personally. Defendant knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Sworn to before me, this
 day of September 19 74

Robert T. Brin
 ROBERT T. BRIN
 NOTARY PUBLIC, STATE OF NEW YORK
 NO. 31 - 0418950
 QUALIFIED IN NEW YORK COUNTY
 COMMISSION EXPIRES MARCH 30, 1975

Victor Ortega

Print name beneath signature

VICTOR ORTEGA

- * Nathan, Manheim & Ashe-Attorneys for the Appellees- 230 Park Ave., New York
- Davis, Polk & Wardwell- Attorneys for the Appellees- 1 Chase Manhattan Plaza, New York
- Danzansky, Dickey & Tydinga- Attorneys for the Appellees- 230 Park Ave., New York.

Appendix - Served 9/5